

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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COHEN, ET AL.,	:	13cv05612
Plaintiffs,	:	
	:	
V.	:	United States Courthouse
	:	Brooklyn, New York
	:	
G & M REALTY L.P., ET AL.,	:	THURSDAY, NOVEMBER 7, 2013
Defendants.	:	

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TRANSCRIPT OF CIVIL CAUSE FOR CIVIL HEARING
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 THE CLERK: Civil cause for a hearing on preliminary
2 injunction, Cohen versus G & M Realty. I ask all the parties
3 to state their appearances.

4 MS. CHANES: Jeannine Chanes, Law Offices of
5 Jeannine Chanes P.C., for plaintiffs.

6 MR. EBERT: David Ebert of Ingram Yuzek for the
7 defendants, and my colleague Mioko Tajika.

8 THE COURT: So we're ready to have Mr. Simmons
9 testify now?

10 MS. CHANES: Actually, your Honor, two things. One,
11 housekeeping. I have some additional exhibits to add to the
12 binder that you already have and a supplemental binder. We
13 haven't killed too many trees with this address. It's some of
14 the issues your Honor raised yesterday.

15 THE COURT: What are the additional exhibits?

16 MS. CHANES: The additional exhibits, one of them is
17 copies of the exhibits to the complaint, which have individual
18 biographies for the individual artists.

19 THE COURT: Mr. Ebert knows what that is?

20 MS. CHANES: Yes.

21 MR. EBERT: I'm just looking at them, your Honor. I
22 just received them.

23 MS. CHANES: And the others are -- there are some
24 Internet printouts of articles specifically about the works of
25 visual art at issue here, in response to some of the questions

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1 that Mr. Ebert raised yesterday.

2 THE COURT: You know, this is kind of an informal
3 type of proceeding, and it may be that those come under the
4 scriptures of rules of evidence, but maybe for the purpose of
5 this hearing, I can accept that.

6 What do you think about that, Mr. Ebert?

7 MR. EBERT: This is all hearsay, and this is not
8 even about the works. They picture the works -- they feature
9 the works or have a picture of the works. These are not
10 criticism --

11 THE COURT: I don't know what they are, but it
12 sounds like hearsay to me.

13 MR. EBERT: And I just got it this morning,
14 your Honor.

15 THE COURT: So we're not going to accept that. If
16 you want to lay a foundation for it -- somebody wants to
17 testify and say that, you know, well, maybe if there's been a
18 lot of articles in newspapers, etcetera, that might be
19 something that, you know, an expert can say, that that's
20 something to consider in terms of deciding what is recognized
21 statute. What I'm trying to do here, quite frankly, in cases,
22 you know, you can't read between the lines, is I'm going to
23 probably decide whether or not so-called aerosol art, in
24 general, in these particular examples of aerosol art, should
25 be considered as recognized stature. That might be something

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1 of value to the public, to the artistic community and to the
2 general benefit of decorating the city, you might say;
3 encouraging that, so I'm just anxious to hear from the experts
4 whether this type of work constitutes recognized stature and
5 what is it. Do you know what recognized stature means?

6 MS. CHANES: I don't think anyone does, your Honor.

7 THE COURT: Well, maybe this will be the case that
8 will give some substance to it, possibly. I think it's
9 important, perhaps, to put some meat to the bones. That
10 statute came into existence, I think, in 1990. I don't think
11 there are many cases out there that really inform the public
12 in how do you determine whether a work is of recognized
13 stature. I'm going to ask the experts those questions. I
14 think it's important to try to understand that. So they can
15 refer to these articles. Maybe it would be relevant if it
16 comes from the testimony of an expert, and is this one of the
17 factors that's considered, then I'm anxious to hear about
18 that.

19 MS. CHANES: So would you like these in your binder?
20 I'm not saying that they're admitted or deemed admitted.

21 THE COURT: Put them all in the binder.

22 MS. CHANES: This can go to the binder you already
23 have. And speaking of experts, your Honor, I am here to ask
24 the Court's indulgence. Mr. Simmons could not make it today.
25 He has a film crew with a commercial endeavor that he's doing

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1 that carried over from yesterday. He can't get out of it.
2 It's part of the way he earns his living.

3 THE COURT: Plaintiff has the burden. I can't
4 accommodate this person indefinitely. What are you trying to
5 do here?

6 MS. CHANES: He can make it tomorrow morning. I see
7 we're on calendar for tomorrow.

8 THE COURT: What do we have on for tomorrow?

9 THE CLERK: We only have two criminal conferences at
10 2:30. We're free in the morning.

11 THE COURT: We'll accommodate him.

12 MS. CHANES: Thank you very much.

13 THE COURT: What else do you have to do today?

14 MS. CHANES: I have two rebuttal witnesses who are
15 both plaintiffs, and one of the rebuttal witnesses can also
16 speak to some of the issues that the Court raises.

17 THE COURT: Rebuttal witnesses, meaning, what?
18 You're going to now -- subject to having Mr. Simmons testify,
19 are there any other witnesses you want to produce?

20 MS. CHANES: Other than Mr. Simmons, there are two
21 plaintiffs that we would like to have testify.

22 THE COURT: They're not rebuttal witnesses, so I'll
23 certainly allow you to have the plaintiffs testify. Okay.
24 And so we'll do that now.

25 MS. CHANES: Okay.

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1 THE COURT: And, then, you'll be prepared -- is it
2 Ebert?

3 MR. EBERT: It's Ebert, your Honor.

4 THE COURT: You'll be prepared to have the Court
5 listen to your experts today?

6 MR. EBERT: Yes.

7 THE COURT: All right. Okay. Let's hear from the
8 other witness.

9 MS. CHANES: Thank you, your Honor. Plaintiffs call
10 Danielle Mastrion.

11 THE CLERK: Good morning. Remain standing and raise
12 your right hand. Do you affirm the testimony you're about to
13 give to the Court in this proceeding will be the truth, the
14 whole truth and nothing but the whole truth?

15 THE WITNESS: Yes.

16 THE CLERK: Thank you. Please have a seat. Please
17 state and spell your name.

18 THE WITNESS: Danielle Mastrion, D-a-n-i-e-l-l-e,
19 M-a-s-t-r-i-o-n.

20 THE COURT: I can hear you okay.

21 Mr. Ebert, can you hear?

22 MR. EBERT: I'm fine, your Honor. Thank you.

23 MS. CHANES: I'm having a little trouble. I guess
24 too much loud music. Permission to approach to give her
25 copies of our binders?

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1 THE WITNESS: Good morning, your Honor.

2 THE COURT: How are you today?

3 THE WITNESS: Good.

4 THE COURT: You're one of the plaintiffs?

5 THE WITNESS: Yes, I am.

6 THE COURT: Do you have any of your work here in
7 these 24 pictures?

8 THE WITNESS: Yes, I do.

9 THE COURT: Which ones are yours?

10 THE WITNESS: It is the portrait of -- the
11 black-and-white portrait.

12 THE COURT: Which number is that? Let me find it.
13 Do you know what number that is, Ms. Chanes? Is
14 that 14?

15 MS. CHANES: No.

16 THE WITNESS: I don't have that.

17 MS. CHANES: Twelve, your Honor.

18 THE COURT: Twelve.

19 THE WITNESS: I don't have the images.

20 THE COURT: Twelve is yours, "Kool Herc"?

21 THE WITNESS: "Kool Herc," yes.

22 MS. CHANES: Exhibit A, page 12.

23 THE COURT: That's yours. A12 is yours; correct?

24 THE WITNESS: I don't have it in front of me.

25 MS. CHANES: Exhibit A.

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1 THE COURT: Look in the green binder. That's yours?

2 THE WITNESS: Yes.

3 THE COURT: And that's the work of aerosol arts?

4 THE WITNESS: Yes, all aerosol, uh-huh.

5 THE COURT: I haven't seen the original but it seems
6 to be extraordinary.

7 THE WITNESS: Thank you.

8 THE COURT: All right. Go ahead.

9 DIRECT EXAMINATION

10 BY MS. CHANES:

11 Q Ms. Mastrion, could you tell the Court a little bit about
12 your educational background.

13 A I have a BFA, Bachelor of Fine Arts, from Parsons School
14 of Design, and my major was illustration.

15 Q And are you a professional artist?

16 A Yes.

17 Q What kind of artist are you?

18 A A painter and a muralist.

19 THE COURT: Painter and what?

20 THE WITNESS: A painter on canvas. I do canvas
21 work. I do commissions. I do gallery work, but I also do
22 murals.

23 Q (BY MS. CHANES) What media do you use?

24 A I use all kinds of painting medium, but I use oil paint.
25 I use acrylic paint for my canvas work, and for all these,

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1 aerosol.

2 Q You do primarily canvas work or primarily mural work?

3 A I do both, but recently more mural work.

4 Q Why are you switching to mural work?

5 A I've been a painter my whole life, and my work just got
6 larger, and larger and larger until it couldn't fit on a
7 canvas anymore, and I naturally moved on to walls. Also, I
8 wanted to work a little bit more with the community, and more
9 people can see works on walls than they can in a gallery or on
10 a canvas, so that was a big motivating factor.

11 THE COURT: Also helpful for judges with failing
12 eyesight.

13 THE WITNESS: Yes, larger works you can see better
14 from far away.

15 Q (BY MS. CHANES) Or passengers on the Number 7 train?

16 A Exactly.

17 Q Do you show your work in galleries?

18 A Yes, I do.

19 Q Is your work collected privately?

20 A It is.

21 Q About how many gallery shows have you had in the last
22 year?

23 A In the last year, probably between 15 to 20, between
24 group shows. I had one solo show. I have a couple more --

25 THE COURT: Can you keep your voice up. All through

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1 New York or are they spread out throughout the country and the
2 world?

3 THE WITNESS: They're in New York. I have shown and
4 displayed in other countries. This year I have not, but last
5 year I was shown internationally, yes.

6 THE COURT: Where? In France?

7 THE WITNESS: In Paris, in Poland, in Germany. This
8 year I did a mural in Belize, so, yes --

9 THE COURT: I assume you are paid for these works.

10 THE WITNESS: Yes. Most of them I am paid for or
11 the trips are compensated for.

12 THE COURT: You make a living through your art?

13 THE WITNESS: Yes, I do.

14 Q (BY MS. CHANES) And, Ms. Mastrion, have you painted at
15 5Pointz?

16 A Yes, I have.

17 Q And about how many times have you painted at 5Pointz?

18 A Five times.

19 Q You had five different works up at 5Pointz?

20 A Uh-huh.

21 Q When you painted at 5Pointz, do you have any particular
22 intent about how long the work will last?

23 A Normally, I know that the piece is going to be up for a
24 significant amount of time, if not permanently, but if it's
25 not going to be up permanently, there's a discussion

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1 beforehand.

2 BY THE COURT:

3 Q It's not going to be what?

4 A If it's not going to be up permanently, if it's going to
5 be covered over, they let me know beforehand.

6 Q You know the nature of what you do when you paint on
7 walls --

8 A Yeah.

9 Q -- that it's really very likely not to be there forever.
10 I mean, I think we're not fooling each other; right?

11 A Yeah.

12 Q So when you do these, you know -- I'm not the standard
13 here. I just happen to like what you do, but when you put
14 "Kool Herc" up, you can't be assured that if you come back
15 five years later it's going to be there, can you?

16 A Weather permitting and quality of the paint, it could.

17 Q It may be, it may not. But, you see, one of the things
18 I'm concerned about -- we're having a different type of
19 hearing here. Mr. Wolkoff is here. I don't think you would
20 want me to render a decision that would have a chilling affect
21 upon the Wolkoffs of the world, so that you'll never have a
22 vehicle to do this type of thing again. That would be
23 counterproductive, wouldn't it? How can I render a decision
24 that would encourage you and others like you to continue to do
25 these things and to encourage the owners of buildings to allow

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1 you to do it? That seems to be like a win-win situation,
2 doesn't it? What does a wise judge do?

3 A Allow for the spaces that are in place already to be
4 there for artists to work because there's not many. There's
5 hardly any left in New York, so they're very hard to come by.

6 Q But if I penalize Mr. Wolkoff for being supportive of
7 this, what impact will that have on the rest of the aerosol
8 world?

9 A I mean --

10 Q I don't want to do that, you see. I don't think you want
11 me to do that either.

12 A No, the thing is, though, if you go to other countries,
13 you know, aerosol art is -- it's accepted everywhere. It's
14 common practice for building owners, developers.

15 Q I'm sensitized. If I find a lawful means of being able
16 to support aerosol art as -- as a -- that phrase under the
17 statute, "recognized stature," I would like to do that. I
18 mean, I'm impressed with what you're all about. Whether I'll
19 be able to do that or not remains to be seen. I want to hear
20 the rest of the experts talk to me. At the same time, I don't
21 want to, you know, write something that would have a chilling
22 effect so that you never have an opportunity to -- you know,
23 to contribute to the urban world that we live in by having
24 things of this nature on the walls. I'm trying to balance
25 those factors out. So whatever help you can give to the Court

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1 to come out with a positive type of decision here that may be
2 of value to you and the Wolkoffs of the world, you can let me
3 know what you think I should do. We're on the same page?

4 A Yes.

5 THE COURT: All right. Go ahead.

6 Q (BY MS. CHANES) Ms. Mastrion, when you painted the --
7 your "Kool Herc" portrait at 5Pointz, did you paint over a
8 previous work of yours?

9 A Yes, I did.

10 Q What was that?

11 A It was an MCA -- a portrait of MCA, the lead singer of
12 the Beastie Boys, a pretty famous Hip Hop group from New York
13 who had recently passed away.

14 THE COURT: You realize the judge is actively
15 involved. It's no jury, and you may read about it in the
16 newspaper. Have you taken photographs of this just in case,
17 whether it's going to be the weather that's going to destroy
18 it, or whether the building is going to be taken down because
19 Mr. Wolkoff may have the right to go forward with this
20 project? Have you taken an effort to preserve these
21 photographs, or fine prints or anything else?

22 THE WITNESS: Photographs, yes, I have taken
23 photographs, but the quality of the photograph can never
24 reproduce the texture of the wall.

25 THE COURT: Did you do the best you can based upon

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1 what photographic methods we have to preserve these works?

2 THE WITNESS: Yes.

3 THE COURT: Because you can make nice prints out of
4 these things, I take it?

5 THE WITNESS: Nice is subjective.

6 THE COURT: I know fine photographers who would be
7 able to make wonderful reproductions. Have you talked to
8 those people?

9 THE WITNESS: I do have photos taken of the piece.

10 THE COURT: I'm going to tell this to you and
11 everybody else here: I'm going to give you that opportunity,
12 and if you really really want to preserve this in the best
13 vehicle you can, short of having them on the wall, I think you
14 should do that between now and the time I'm going to render my
15 decision; because the likelihood is I'm going to allow
16 Mr. Wolkoff to go forward, I'm just not pulling any punches
17 here. I would like this to be preserved. I'm going to tell
18 you that all the artists, and everybody else, they have an
19 opportunity to do it now. It's up to them whether they want
20 to do it. If they don't care, that would be something
21 different, too; right? If they do care, then we get the
22 photographers as best they can over the next few days.

23 MS. CHANES: I can tell them that, but the
24 photograph is not the equivalent of an original work of art.

25 THE COURT: It's up to them. I'm just giving them

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1 the opportunity, so we have a clear record that today they are
2 being given some notice that they should take advantage of
3 this time to make sure they preserve their works which you
4 feel very strongly about. And I may well like to go to a
5 gallery and buy this someday. You're not going to deprive me
6 of the opportunity of doing that, are you?

7 THE WITNESS: No, but unless each photographic print
8 was two stories high --

9 THE COURT: I don't know. I just want to give you
10 the opportunity.

11 THE WITNESS: You lose quality in a photograph
12 versus a wall.

13 THE COURT: But you do want to preserve it; right?

14 THE WITNESS: Yes.

15 THE COURT: Go ahead.

16 Q (BY MS. CHANES) Ms. Mastrion, I'm sorry, you said you
17 painted this portrait of "Kool Herc" in about June 2013?

18 A Yes.

19 Q And you painted over an existing Beastie Boys mural; is
20 that correct?

21 A Yes.

22 Q And you heard testimony yesterday about a Beastie Boys
23 mural that you had that was painted over earlier; is that
24 correct?

25 A Yes.

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1 Q Was -- strike that. Mr. Ebert left the court, I believe,
2 with the impression that you did not paint this "Kool Herc"
3 portrait directly over your own work; is that correct?

4 MR. EBERT: Is it correct that I left that
5 impression?

6 MS. CHANES: Yes.

7 THE COURT: I don't know. The question is not the
8 best question, but, you know --

9 MS. CHANES: I'm sorry.

10 THE COURT: It doesn't matter much here.
11 You painted over other work; right?

12 THE WITNESS: Yes.

13 THE COURT: Was it your work that you painted over
14 or somebody else's work?

15 THE WITNESS: Mine.

16 THE COURT: Your work?

17 THE WITNESS: Uh-huh.

18 THE COURT: That's gone?

19 THE WITNESS: Yes.

20 THE COURT: So that's not permanent, is it? You
21 decided to just paint over it?

22 THE WITNESS: It was up for a very long time.

23 THE COURT: Pardon me?

24 THE WITNESS: It was up for a very long time.

25 THE COURT: Did you take any pictures of it? Can I

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1 see it?

2 THE WITNESS: In some of the article printouts, we
3 have images of --

4 THE COURT: Images from newspapers?

5 THE WITNESS: Yes.

6 THE COURT: So you're not terribly concerned about
7 preserving your prior work, are you?

8 THE WITNESS: I would have loved for it to be
9 preserved, but I felt that this one going over it was even
10 more important.

11 THE COURT: I just wanted a feel for it.

12 THE WITNESS: This was more important at the time
13 for what I was painting.

14 THE COURT: That you can paint over this next year,
15 if you wanted to? It's your work, so to speak?

16 THE WITNESS: Yes, if the piece was even more
17 important and more relevant at the time, yes.

18 Q (BY MS. CHANES) Ms. Mastrion, do you ever reproduce work
19 that you've done and paint the same painting again somewhere
20 else?

21 A No.

22 THE COURT: So -- tell me, as an artist, you have
23 this work here, you want it to be permanent? What do you
24 think Mr. Wolkoff should do? What would you like him to do?

25 THE WITNESS: I would love for the building to stay.

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1 THE COURT: To stay like that?

2 THE WITNESS: To stay like that.

3 THE COURT: It's a million dollars' worth of
4 property; it's going to stay this way because you painted
5 these paintings on the wall? You think that's really fair to
6 him? If I do that, it's going to destroy the aerosol art
7 world.

8 THE WITNESS: Not even in New York, internationally
9 it is going to be a huge blow.

10 THE COURT: It will destroy it?

11 THE WITNESS: Yes.

12 THE COURT: If I make that decision, if I do what
13 you want me to do and what counsel wants me to do, it's going
14 to be the end of the aerosol --

15 THE WITNESS: Not the end of it, but --

16 THE COURT: A damaging blow?

17 THE WITNESS: In New York, yes.

18 THE COURT: And not elsewhere?

19 THE WITNESS: Internationally, it will have -- I
20 mean, there are spaces all over the world that allow walls to
21 be painted, so it's not like an -- artists are not going to be
22 able to paint anywhere else again in the world, but in
23 New York --

24 THE COURT: It would be a crippling blow to
25 New York?

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1 THE WITNESS: Yes, it will be.

2 THE COURT: I like walking down the streets and
3 seeing these things. I'll never see it again. We don't want
4 to do that, do we?

5 THE WITNESS: Uh-huh.

6 THE COURT: You tell me.

7 MS. CHANES: If I may jump in here, I'm not sure
8 that Ms. Mastrion is responding to your question.

9 Q (BY MS. CHANES) Were -- when you said it would be a
10 terrible blow to the aerosol arts community, were you talking
11 about the destruction of 5Pointz, or were you talking about
12 the preservation of the building in some form going forward?
13 Which of those things would be --

14 THE COURT: I'm telling you that no other builder is
15 going to allow aerosol art on their building if I come down
16 hard against Mr. Wolkoff; you agree with that, don't you?

17 THE WITNESS: Yes.

18 THE COURT: Next question.

19 MS. CHANES: If I may, with all do respect,
20 your Honor, no other builder is going to let them do it
21 without a VARA waiver.

22 THE COURT: What?

23 MS. CHANES: A VARA waiver, a waiver of VARA rights,
24 which is -- the law's been in place since 1990, and that's
25 what should have been done here. It's very simple. You get

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1 the forms online. It's very easy to do.

2 THE COURT: I understand.

3 Q (BY MS. CHANES) Ms. Mastrion, based on your classical
4 art background, how do you personally analyze the merit or the
5 stature of a work of art?

6 A There's a couple of factors that come into play;
7 technical ability, composition, color, line work, detail and
8 also the artist's credentials.

9 THE COURT: That's what I should consider in
10 determining whether something is a so-called work of
11 recognized stature that you just told me?

12 THE WITNESS: It's what I consider a recognized
13 stature, and other artists as well, why works become as
14 important or as prominent as they come --

15 THE COURT: Go through the factors again for me that
16 you think qualifies as a work of recognized stature.

17 THE WITNESS: Technical ability. Aerosol art is --

18 THE COURT: Technical ability.

19 THE WITNESS: Technical ability. Aerosol is an
20 extremely different medium to master.

21 THE COURT: Even more so than the other mediums.

22 THE WITNESS: Yes, because a lot of things come into
23 play. It's not just the medium and the canvas. It's texture
24 of the wall. It's wind. It's weather.

25 THE COURT: Degree of difficulty?

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1 THE WITNESS: It's extremely difficult, yeah.
2 Besides all the other elements that have to come into play;
3 physically using a spray can, and getting the line work and
4 getting the detail. It's extremely difficult to master.

5 THE COURT: So the degree of difficulty?

6 THE WITNESS: Yes.

7 THE COURT: What were the other things you
8 mentioned?

9 THE WITNESS: Composition, color, use of color, line
10 work, detail in an a piece, and also the artist's credentials.
11 You know, who the artist is plays a very important part in the
12 merit of the work.

13 THE COURT: Public recognition?

14 THE WITNESS: Uh-huh.

15 MS. CHANES: Such as Banksy?

16 THE COURT: Is that a factor?

17 THE WITNESS: I mean, Picasso can put a squiggle on
18 a canvas and it will still sell for millions just because it's
19 a Picasso.

20 THE COURT: That would be considered a work of
21 recognized stature?

22 THE WITNESS: Yes, if his hand --

23 THE COURT: Just because it's done by Picasso?

24 THE WITNESS: If his hand touched it, boom.

25 THE COURT: So now we have a gallery downstairs.

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1 Have you had the chance to look at the court's gallery?

2 THE WITNESS: I saw some paintings as I was walking
3 through, but I didn't get to --

4 THE COURT: Take a look again, if you have a chance.
5 Tell me whether you think that the fact that those paintings
6 are hung up in the court gallery, would that mean that they
7 are works of recognized stature?

8 THE WITNESS: I would have to look at each
9 individual piece.

10 THE COURT: The fact that it has a public
11 exposure --

12 THE WITNESS: Uh-huh.

13 THE COURT: -- that in itself would not be the
14 determining factor as to whether it should be considered a
15 work of recognized stature? You need to do more than that?

16 THE WITNESS: It depends who's looking at it, and
17 when you say --

18 THE COURT: Just saying the fact that it's in a
19 public facility here, whatever that work may be downstairs,
20 you're looking at, does it make any difference what you
21 believe the quality is, or the lines, or the texture, the
22 degree of difficulty or is it just sufficient the fact that
23 it's recognized by the court gallery?

24 THE WITNESS: That is pretty significant. If the
25 courts deem that this artwork is good enough to put up --

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1 THE COURT: Would I need to go beyond that? Would
2 you have to look at the quality of the work also or who the
3 artist was?

4 THE WITNESS: I think you have to take it all into
5 consideration, all of it.

6 THE COURT: So you can -- maybe if the court gallery
7 just contained silly stuff, just blank canvas, you might say
8 that it's not a work of recognized stature, even if it's
9 recognized by the court?

10 THE WITNESS: It could be. I can tell you many
11 blank-looking canvases that sell for millions of dollars.

12 THE COURT: You saw the play "Art" years ago?

13 THE WITNESS: No.

14 THE COURT: It was before you -- I don't think it
15 was before you were born.

16 MS. CHANES: I never saw it.

17 THE COURT: Anybody know that play, "Art" by
18 Ressa (phonetic) who did that?

19 MS. CHANES: A few people in the back.

20 THE COURT: That's one that's old. It was basically
21 a white canvas, and before your time, I guess. And it was,
22 you know, a very successful Broadway play. Really brought
23 people who are art experts to enter into a dialogue as to
24 whether or not that qualified as a work of art. It was pretty
25 good stuff. Anyway -- and when it comes back again, you'll

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1 see it next time around; right?

2 THE WITNESS: Uh-huh.

3 MS. CHANES: Is it going to be revived soon?

4 THE COURT: Take a look at what's in the court
5 gallery. I'm interested in your reaction to it, whether we
6 made a wise decision or an unwise decision.

7 MS. CHANES: Did the court buy these pieces?

8 THE COURT: We have a gallery and have exhibits all
9 the time. We have a committee that selects the work, so I
10 don't know whether or not that constitutes -- you'll let me
11 know what you think of it. I'll ask the other experts the
12 same question. Maybe they can use that as a basis to tell me
13 whether that would qualify as a work of recognized art.

14 Have your experts look at it also, Mr. Ebert.

15 MR. EBERT: Will do, your Honor.

16 Q (BY MS. CHANES) Ms. Mastrion, yesterday when you were in
17 court, you heard Judge Block ask questions about the
18 professional careers of some of the plaintiffs in this case;
19 correct?

20 A Yes.

21 Q Can you help the Court out a little bit with some of that
22 information?

23 A I can, uh-huh.

24 Q Would you do that?

25 A I know a lot of the artists, and I know the work that's

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1 on display.

2 Q Exhibit A, page 1?

3 A Sure. Okay.

4 Q Would you talk to the Court a little bit about that
5 piece.

6 THE COURT: Can you put it up on the screen also?
7 We may have some people in the audience that would like to
8 follow along. Is it possible?

9 MS. CHANES: Jeannine seems to have a habit of
10 losing exhibits.

11 THE COURT: How could we do that?

12 THE CLERK: If they have it.

13 THE COURT: Do you have the exhibits? Maybe you can
14 use the ELMO there, so we all can look at the pictures.

15 MS. CHANES: Ms. Ebert, may I borrow your binder for
16 this purpose?

17 MR. EBERT: Which binder?

18 MS. CHANES: The green binder -- or just the first
19 tab, A.

20 MR. EBERT: Actually, no, because I have written on
21 it.

22 THE COURT: You want to use mine?

23 MS. CHANES: That would be greet.

24 THE COURT: Just put it on the ELMO. Dim the lights
25 so we can all see it. That would make easier than just saying

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1 turn the page, so to speak. That's the first one; right?

2 MS. CHANES: Yes.

3 THE COURT: What's your question?

4 Q (BY MS. CHANES) Ms. Mastrion, could you discuss this
5 work based on the criteria that you establish? I think you
6 said there were two, four, six criteria?

7 A Yes.

8 THE COURT: Can everybody hear? You want to put the
9 microphone on. Just test it out so we're not blown away.

10 MS. CHANES: Does this work? I feel like I'm in
11 France.

12 Q (BY MS. CHANES) Ms. Mastrion, could you talk to
13 the Court a little bit about this first piece based on the
14 criteria that you identified for evaluating works of art?

15 A Sure. I mean, even on first glance, the technical
16 ability of this, the fact that, you know, Mr. Cohen used the
17 wall. He had windows that he had to incorporate into the
18 piece, his ability to use the physical space in front of him
19 and still create a piece that compositionally is so sound,
20 flows; your eye travels around the whole piece. It looks like
21 a simple piece but it's not simple. The line work on this is
22 so thin. It is extremely detailed. It takes a very very high
23 level of skill even to do these little simple characters that
24 he has. It's very very difficult to do this, so even just on
25 the technical ability alone, it's -- it's up there with, like,

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1 a high value.

2 Q And can you discuss the composition?

3 A It flows. The colors pop off each other. Your eye goes
4 around the entire piece, and also this -- it's -- I know that
5 it's members of the neighborhood. It's members of the
6 community. There's a story behind it as well. It's the story
7 and the impact on the people it represents in the community
8 that also makes the piece extremely important.

9 Q And, also, a comment about the artist. Just briefly. I
10 know Mr. Cohen was on yesterday.

11 A I mean, Meres in the New York art community, the world
12 community, he's one of the best, technically, graffiti artists
13 out there. His reputation as an artist in general goes
14 unprecedented. He's extremely well known.

15 THE COURT: You use the word "graffiti art."

16 THE WITNESS: Uh-huh.

17 THE COURT: Maybe have a sense of that, an aerosol
18 artist? What's the right nomenclature that I should use?
19 Should I call it graffiti art or aerosol?

20 THE WITNESS: It has a lot of nicknames. You can
21 call it aerosol art because aerosol encompasses the whole
22 medium.

23 THE COURT: Which consists of using aerosol; is that
24 what we're talking about?

25 THE WITNESS: Yes.

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1 THE COURT: That's what you mean by aerosol
2 graffiti? Other than criminally, graffiti artists, just --

3 THE WITNESS: It doesn't have to do with the
4 aerosol, it would be like throwing soda on --

5 THE COURT: You're calling it aerosol. Speaking in
6 general, graffiti?

7 THE WITNESS: Yeah.

8 THE COURT: Okay.

9 Q (BY MS. CHANES) Going back to Exhibit A, page 1, as a
10 member of the aerosol arts community, do you consider this to
11 be a significant piece?

12 A Yes.

13 Q Let's go to page 2.

14 THE COURT: Are we going through all 24 or --

15 MS. CHANES: I was going to. Although it's possible
16 that Ms. Mastrion cannot -- is not comfortable or is not --

17 THE COURT: We'll go through.

18 If you say your answer to number two would be the
19 same as number one, you could say that, in addition to you
20 want to add because that's what you're telling me.

21 THE WITNESS: Okay.

22 Q (BY MS. CHANES) So with respect to page 2, would you
23 comment on the six elements you previously identified with
24 respect to this piece.

25 A Well, first of all, it's a collaboration between Meres

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1 and TooFly.

2 THE COURT: Can you spell TooFly?

3 THE WITNESS: T-o-o-F-l-y. She is probably the most
4 famous graffiti artist working in New York right now, and
5 she's also one of the most famous graffiti artists all over
6 the world. She paints all over the world. She exhibits all
7 over the world.

8 THE COURT: How does she make a living?

9 THE WITNESS: She sells canvas. She does T-shirts,
10 clothing. She sells -- like I said, she sells canvases.
11 She's a teacher.

12 THE COURT: She can make T-shirts out of this.

13 THE WITNESS: I have seen her put her artwork on a
14 lot of different things, so she is recognized in the
15 international art world as well. She's one of the most famous
16 female graffiti artists out there.

17 THE COURT: You keep using the word "graffiti"
18 artists.

19 THE WITNESS: Graffiti aerosol artist.

20 THE COURT: This is aerosol work?

21 THE WITNESS: Uh-huh.

22 Q (BY MS. CHANES) Very briefly, could you address
23 composition and technical ability, color details, subject
24 matter?

25 A The fact that Meres' piece -- it's called "Wild Style."

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1 That -- if -- people don't understand what it is. If you
2 think of an abstract expressionist like Jackson Pollock, any
3 of the abstract expressionists, that is the equivalent of a
4 "Wild Style" piece; continues line work, speed, flows
5 together. And TooFly did --

6 Q If I may interrupt, "Wild Style" starts with letters but
7 then uses letters and makes them abstracts; is that correct?

8 A Yes. And there's a lot of movement in the lettering
9 piece, just like with abstract expressionism; tons of movement
10 in the piece, so technical ability and composition. And "Wild
11 Style" pieces in general, that's what you talk about when you
12 see a "Wild Style" piece. And the fact that he was able to
13 collaborate that with a TooFly character, this is more
14 illustration. It's more painterly. The fact that they were
15 able to combine the work together to make a unified piece
16 makes this a very very strong work.

17 Q And in your impression as -- strike that. In your
18 opinion as a member of the aerosol arts movement, is this a
19 significant piece?

20 A Yes, because also the technical ability, the line work,
21 the -- how thin the lines are, how much they flow. I remember
22 the day this piece was painted, and it was extremely windy out
23 that day, extremely. The fact that they were even able to get
24 that level of detail line work on that day when this was
25 painted -- I mean, technical ability wise, it's a great piece.

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1 THE COURT: Since you were there, how long did it
2 take the artist to do that?

3 THE WITNESS: I wasn't there that day, but I
4 remember the day it was painted, because I saw photos of it
5 when it was coming up, and I remember the weather was very bad
6 that day.

7 THE COURT: You don't know how long it took them to
8 do it?

9 THE WITNESS: No, I don't know how long it took.

10 Q (BY MS. CHANES) It was painted over uneven surfaces;
11 correct?

12 A Correct.

13 Q Using various elements of the building?

14 A Uh-huh.

15 Q Page 3, again, the six criteria?

16 A Well, we spoke about Meres. But also Shiro -- I have
17 painted with Shiro before. I've done collaborative pieces
18 with her. She's an artist from Japan. Her reputation
19 internationally and in the United States is -- she has a huge
20 reputation. She shows in galleries all over the world. She
21 paints. She gets flown to paint all over the world, so Shiro
22 pieces and her signature style -- like, her characters, which
23 you can see all the way on the right, if you see that piece
24 anywhere, you will recognize it as a Shiro piece in any
25 country, and people come to see her work because of how famous

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1 she is.

2 Q To the best of your knowledge, she makes her living as a
3 professional artist?

4 A Yes. And, again, this is another collaboration piece, so
5 the fact that two artists were able to creatively,
6 compositionally -- the piece flows all the way together,
7 bouncing off each other back and forth; the use of color, how
8 bright it is, and also the level of detail. You can see in
9 that pirate ship up there, the fact that you were able to make
10 that pirate ship with aerosol. The level of technical ability
11 is very very high, all the details in the background. The
12 "Wild Style" piece is incorporated with the painterly pieces
13 with the illustrative pieces. There's so many elements of
14 art.

15 THE COURT: So the aerosol is sprayed; right?

16 THE WITNESS: Uh-huh, aerosol spray.

17 THE COURT: How do you control the spray so it's not
18 like a big blotch? I think it's a fine line.

19 THE WITNESS: Practice. Practice. Practice. It --
20 you have to -- you paint with your ears; you hear how the
21 paint is coming out of the can, how much pressure you put on
22 the can, like how difficult -- it's not just like a brush
23 where you can go like this and you know what kind of line is
24 going to come out.

25 THE COURT: Easy to use a brush?

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1 THE WITNESS: Yes. You have to listen to the can.
2 You have to listen to if the paint is running out. That's why
3 you hear the rattle when you shake a spray can. There's a lot
4 of physical things that come into using aerosol art. Also
5 they have fat caps, which is like a fat paint brush. You have
6 skinny caps, which is like a thin paint brush. You have to
7 know which caps to use. There's hundreds of different-sized
8 caps to use, so there's a lot that goes into being able to do
9 this.

10 Q (BY MS. CHANES) Ms. Mastrion, are those paints
11 oil-based?

12 A No, they're not.

13 Q Okay. But they're permanent once they dry; correct?

14 MR. EBERT: Objection, your Honor. Could we not
15 have the witness testify, please.

16 THE COURT: She wants to testify. She's interested
17 in the arts.

18 So the difference between painting this vehicle, I
19 guess -- I guess paint is more permanent and this is less
20 permanent; I think that's what she's trying to drive out.

21 THE WITNESS: Uh-huh.

22 THE COURT: Is there a difference between the two?

23 MR. EBERT: Your Honor, I'm having trouble hearing.

24 THE COURT: You're talking about aerosol; you're
25 talking about some type of paint. What is the difference

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1 between that and the paint that you use on a canvas with a
2 brush?

3 THE WITNESS: One is the speed, how fast and how big
4 you can do it. You can get very very huge lines that you
5 can't get unless you have a paint bush that's this fat.

6 THE COURT: Which is more fragile? Which is more
7 likely to disappear with time? The aerosol paint? Or is it a
8 certain type of paint we're talking about?

9 THE WITNESS: Again, it depends on the conditions.
10 If it's not exposed to direct sunlight it could last longer,
11 the quality of the paint. Just like with oils or acrylics, if
12 you have more expensive, better paint --

13 THE COURT: So you can have aerosol paint, so to
14 speak, that's a better quality than --

15 THE WITNESS: You could.

16 THE COURT: How about what you did? What's the
17 quality of that paint?

18 THE WITNESS: I try to buy the best quality paint
19 that I can.

20 THE COURT: Would you say it's as good as what would
21 be done if you painted on a canvas with oils?

22 THE WITNESS: It's different. You get a different
23 effect. That's why it's a different medium.

24 THE COURT: But in terms of, you know, its
25 fragility, its vulnerability to disappear -- I guess I'm not

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1 an artist so I don't know what words to use, but which is more
2 likely to be permanent, I guess?

3 THE WITNESS: It's really hard for me to say,
4 because when --

5 THE COURT: It depends on what you use? "So this
6 aerosol paint," is that the right phrase to use?

7 THE WITNESS: Yeah.

8 THE COURT: That may be of more substance or more
9 durable than maybe oils? Depends on the quality of each;
10 right?

11 THE WITNESS: Also it depends on the -- if you're
12 painting with oils, the quality of the canvas, the type of
13 canvas; if you prime your canvas first, what you prime the
14 canvas with, if you sealed it -- I mean, there's so many --

15 THE COURT: All right. Okay. You answered the
16 question. Go ahead.

17 Q (BY MS. CHANES) Page 4. Could you comment on this work,
18 based on the six criteria you've identified?

19 A "Eleanor RIP."

20 Q Yes.

21 A Well, one technical ability and composition, like I said,
22 like the abstract expressionist piece, the way the piece
23 flows, the expression, the emotion behind it. I know the
24 personal story behind this piece, so it does tell a story as
25 well. The use of color, I mean, it's muted, but the colors

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1 are also bright, also the line work and the detail. If you
2 look in this, there's a lot of very very fine line work in
3 this.

4 THE COURT: So move it along. You looked at all
5 these 24 before, obviously. Your answer with respect to each
6 of them -- so we don't have to spend the next two hours here,
7 they're pretty much the same as what you've testified to,
8 these two, three or four?

9 THE WITNESS: Yes. And also -- I mean, for the work
10 that's up at 5Points that's here today, the reputation of the
11 artist. I know a lot of people might not be so familiar with
12 them, but almost all of the artists that are shown here today
13 have collect -- they're shown internationally. Their works
14 sell for thousands of dollars. Like, when we say people come
15 to 5Pointz to see this work, maybe to meet the artists, that
16 is why, so you might not be so familiar with a lot of the
17 backgrounds but all of the artists have a huge outline.

18 THE COURT: You're the one representing the 24
19 photos?

20 THE WITNESS: Yes.

21 THE COURT: Anything else you want to add to that?

22 MS. CHANES: Actually -- and I understand we want to
23 move this along, your Honor. I would like her to comment on
24 the Lady Pink piece on page 7.

25 THE COURT: I'm trying to avoid having to go through

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1 the next 17. If you want to call attention to any one in
2 particular, otherwise her answers that she gave me, I think,
3 apply to all of these 24; correct?

4 Yes, that's what you're telling me. Basically that
5 same criteria is manifested and reflected in the others as
6 well; right?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

9 Q (BY MS. CHANES) Do you have anything in particular,
10 Ms. Mastrion, that you would like to add with respect to page
11 7 and Lady Pink, who is the artist that painted that?

12 A Lady Pink is one of those artist, like I said, with
13 Picasso. She can put a dot on the wall and people will come
14 from everywhere to see it. She is the first female graffiti
15 artist to ever come out of New York City.

16 THE COURT: You mean aerosol artist?

17 THE WITNESS: Aerosol artist, graffiti artist, to
18 come out of the New York City. She's now a teacher. She
19 shows all over the word. Any female artist that paints today
20 that comes from New York City will say -- or even -- not even
21 from New York will say Lady Pink is one of their biggest
22 influences, and I know this piece. It's up very very high.
23 It's one of the permanent pieces.

24 THE COURT: So you're telling me that even if she
25 came and put a dot on the wall, because it's Lady Pink, you

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1 would say that's recognized stature?

2 THE WITNESS: Yes, I would.

3 THE COURT: Just solely based upon the artist's
4 reputation?

5 THE WITNESS: Yes. Yes, people come from everywhere
6 if they know that Lady Pink is painting.

7 THE COURT: Doesn't matter what -- the quality of
8 what she does, it's her name that, in your opinion, satisfied
9 the standard of recognized stature?

10 THE WITNESS: Her name alone, amongst the other
11 things as well.

12 THE COURT: So you have somebody who is so prominent
13 like Lady Pink, or Picasso or maybe you, it doesn't matter
14 what they put on the wall, that would be recognized stature;
15 right?

16 THE WITNESS: At this -- at this point in her
17 career, yes. I'm sure if Picasso put a squiggly line the
18 second day he started painting, people might not recognize it,
19 but the fact that he is now Picasso, they will recognize that
20 now, so --

21 THE COURT: Go ahead.

22 MS. CHANES: I think that's all, your Honor, since
23 you're not going through all the pieces of art.

24 THE COURT: I don't want to curtail you. I want to
25 see whether we can move it along without inhibiting you. If

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1 you want to show any one particular work of art or a few more,
2 go ahead. It's up to you. I enjoy looking at them myself.

3 Q (BY MS. CHANES) I would ask Ms. Mastrion to look at
4 Exhibit A, page 24.

5 A Yes. Dasic's piece.

6 Q Could you comment on this based on your criteria?

7 A Technical ability alone, this piece, when you see it in
8 person, blows your mind away. You literally feel like you can
9 walk into this piece. Color work, detail, the story behind it
10 and I know that this was based on a famous old French poem, so
11 there's a big story behind it, too. So technical ability
12 wise, the way it looks, the way it feels when you see it, it's
13 one of the best pieces that you see in the permanent
14 collection up top on 5Pointz. But also Dasic, I know he's an
15 artist from South America, and he's actually here right now on
16 a work visa. The government granted him a work visa to do
17 murals in Upstate New York in some of the, like, badder (sic)
18 neighbors, to kind of --

19 THE COURT: Outdoors or in doors?

20 THE WITNESS: Outdoors.

21 THE COURT: The factory (sic) has asked him to do
22 this on certain outside surfaces?

23 THE WITNESS: He's here on a work visa, working to
24 paint murals in Newburgh and in a couple of other neighbors.

25 THE COURT: Government buildings?

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1 THE WITNESS: They're city buildings.

2 THE COURT: City buildings?

3 THE WITNESS: Yeah, city buildings.

4 THE COURT: So the city wants that work to be on the
5 outside of its buildings?

6 THE WITNESS: And he's painting walls and also
7 responsible for curating other artists to come and paint on
8 the walls.

9 THE COURT: You think we should hire him to paint on
10 the exterior of the courthouse? Maybe not a bad idea.

11 THE WITNESS: But he -- so he's here -- he does a
12 lot of community outreach, so he's known in the art community
13 for doing that. The reason he's here now on the work visa is
14 to improve the bad neighbors Upstate. That's one of the
15 reasons. Technically wise also --

16 THE COURT: So this is a variable-type contribution,
17 brighter neighbors and --

18 THE WITNESS: Yes.

19 THE COURT: -- add a little bit of color, but sort
20 of a cultural outreach to the communities.

21 THE WITNESS: Yes, that's what murals do, and that's
22 what outdoor art does. That's why in New York City the
23 neighborhoods with the highest amount of murals are --

24 THE COURT: All these aerosol works -- when you say
25 "outdoor art," they're all aerosol?

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1 THE WITNESS: For the most part, yes.

2 THE COURT: Is there another way of doing this?

3 THE WITNESS: I mean, you can do it with a brush,
4 and maybe with a bucket of paint and with rollers, but it
5 doesn't have the same effect. It's not as long lasting.

6 THE COURT: What's his name again?

7 THE WITNESS: Dasic.

8 THE COURT: So he's going to do the work up in
9 the -- that the government's asked to do by aerosol?

10 THE WITNESS: I know that he works primarily in
11 aerosol.

12 THE COURT: Go ahead.

13 Q (BY MS. CHANES) Ms. Mastrion, could you also address
14 Exhibit A, page 10, which is "Beauty and the Beast" by Esteban
15 del Valle.

16 MR. EBERT: We just heard that she has the same
17 testimony for each of these images.

18 THE COURT: I can give her a little bit of
19 flexibility. You may not disagree with any of this. I don't
20 know.

21 MR. EBERT: It's completely -- it's completely
22 irrelevant. We don't have to hear it twice.

23 THE COURT: Well, you know, I don't mind looking at
24 the paintings.

25 Go ahead.

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1 MS. CHANES: That's Esteban?

2 A Uh-huh.

3 Q Could you comment on this work based on the six criteria
4 you identified?

5 A I mean, if you know your art history --

6 THE COURT: Is there anything about this that's a
7 little different that you want to add to the testimony you
8 gave me about the artist?

9 THE WITNESS: This piece, I think, is one of the
10 most painterly pieces done at 5Pointz, and also there's a lot
11 of history and art history references to it, so I know for a
12 fact that when they bring the school groups to come to
13 5Pointz -- I know there's a lot of busses of school groups --
14 they focus on this painting a lot because it represents
15 Van Gogh. It represents "Beauty and the Beast." There's a
16 lot of history and references speaking of art history in this
17 piece, so --

18 THE COURT: So that makes it a little bit more
19 special, and it's because it draws a lot of people?

20 THE WITNESS: Uh-huh. And I was here the day after
21 this was painted, and I stood in front of it for 20 minutes,
22 unable to even, like, speak or move because I had never seen a
23 piece of this caliber.

24 THE COURT: Who's the artist?

25 THE WITNESS: Esteban del Valle.

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1 THE COURT: What about him?

2 THE WITNESS: I know he's from -- I believe he's
3 from either South America or Spain. I know that he's an
4 international artist, and he paints -- same thing, he paints
5 all over the world, and all his pieces look like -- you know,
6 they look like, you know, a Picasso or that painterly quality
7 that you maybe sometimes don't attribute to outdoor artwork.
8 And also, size wise, the fact that he was able to do this on
9 such a large scale -- you know, that wall is maybe the size of
10 the wall that the flag is on, so technically wise that's
11 another reason. But the history, and the art history and the
12 idea behind it is very significant of 5Pointz.

13 THE COURT: Don't me let me put words in your worth,
14 but it's more difficult to do it on the wall than on a regular
15 canvas?

16 THE WITNESS: It is.

17 THE COURT: Go ahead.

18 Q (BY MS CHANES) Taking a page from the judge,
19 Ms. Mastrion, just flipping through these exhibits, is
20 there -- are there any ones in particular that you have
21 something to say about, other than the general comments
22 Mr. Ebert was referring to?

23 THE COURT: Want to say anything more about yours?

24 THE WITNESS: I mean, I do --

25 THE COURT: Here's a good opportunity for you to put

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1 a plug in.

2 THE WITNESS: I do mostly portrait work and portrait
3 commission work, so when I was approached to do the "Kool
4 Herc" portrait --

5 THE COURT: This is A12 we're talking about?

6 THE WITNESS: Uh-huh -- for the 40th anniversary of
7 Hip Hop, he -- I mean, if you're from New York, and you're
8 familiar with the movement and the music, even if you're not,
9 you know that Kool Herc is considered, like, the godfather of
10 that. So for me, one, it was an honor to paint him. Two, I
11 love doing portraits, and the biggest portrait I could do, I
12 was very very happy to do. And I wanted to make sure that it
13 was almost an exact replica of him. And the day of the event,
14 he actually showed up, and I have a lot of photos. And I
15 believe there was an article we brought of him standing next
16 to the piece.

17 THE COURT: I wonder how many of my colleagues on
18 the bench have never heard of him?

19 THE WITNESS: You have to be immersed in the
20 community, and the movement and the art community to know
21 these people, but this is a multibillion-dollar industry we're
22 talking about so, you know, these people are very important.

23 THE COURT: You think we should arrange a field trip
24 for all the judges to go out there to look at this?

25 A I do.

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1 Q They'll render a better decision --

2 THE WITNESS: Yes, seeing it in person will have a
3 big impact.

4 MS. CHANES: I think plaintiffs and defendants, too,
5 would appreciate the Court actually going out to actually see
6 the building --

7 MR. EBERT: Why are you speaking for defense?

8 MS. CHANES: I did say --

9 MR. EBERT: Your Honor --

10 THE COURT: Let's stop this. If this was a more
11 traditional type of proceeding, we wouldn't be having this
12 type of back and forth. Obviously I'm interested in what this
13 is all about, so I'm a little bit more flexible.

14 Go ahead. Let's go.

15 Q (BY MS. CHANES) Anything else? Any of the other
16 exhibits, Ms. Mastrion?

17 A I mean, I think that applies for almost all of the
18 pieces.

19 Q So no other specific different comments?

20 THE COURT: I think we covered it. Go ahead.
21 Anything else you want of this witness?

22 MS. CHANES: No, other than her comments about the
23 art downstairs at the break.

24 THE COURT: I want to hear about that.

25 MS. CHANES: I know you do.

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1 THE COURT: I want to know whether the court made an
2 improper decision in allowing that art to be shown in our
3 gallery.

4 THE WITNESS: Is there a curator for the court?

5 THE COURT: Not really, but it's kind of interesting
6 work.

7 Mr. Ebert, you want to ask any questions of this
8 fine artist?

9 MR. EBERT: Yes, your Honor.

10 THE COURT: You you want to still use the screen or
11 put the lights back on?

12 MR. EBERT: I'm not going to use the screen,
13 your Honor.

14 THE COURT: Somebody put the lights back on.

15 MR. EBERT: May I?

16 THE COURT: Go ahead.

17 CROSS-EXAMINATION

18 BY MR. EBERT:

19 Q Are you an expert in graffiti art?

20 A Yes.

21 Q What makes an expert in graffiti art? Have you done
22 research?

23 THE COURT: I think graffiti, as I understand it as
24 it's in criminal law, that would be any marking on a building
25 without the owner's permission. I think that's what graffiti

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1 is under the criminal law, but I think here we're talking
2 about something that's called "aerosol art." I know that's
3 the phrase I'm going to use.

4 Q (BY MR. EBERT) Okay. You're an expert in aerosol art?

5 A Yes.

6 Q When did you become an expert in aerosol art? What year?

7 A My whole life.

8 Q Starting when?

9 A I've been looking at graffiti in New York City since I
10 was -- literally since I was born.

11 Q And when you were born, you were an expert in aerosol
12 art?

13 A No, I've become an expert.

14 Q Please tell me when you became an expert in aerosol art.

15 A I started painting with aerosol about two years ago, but
16 I've been immersed in the community for well over ten years.

17 Q And to come here and give this testimony as an expert,
18 did you research whether any of these works appear in any
19 books? Did you do that research?

20 A I mean --

21 Q Did you do the research whether any of these pieces are
22 in any books about graffiti or anything else?

23 THE COURT: The question is do you know? You're an
24 expert, I guess, because the way you've testified here, but as
25 a practical matter, have you found out whether any of these

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1 works appear in any books or publications? That's the
2 question.

3 THE WITNESS: I know they do.

4 THE COURT: You know any specifics?

5 THE WITNESS: Street Art NYC. There's a blog.

6 THE COURT: Blog?

7 THE WITNESS: Yeah, a blog. Street Art NYC. I know
8 a lot of these artists have been approached to have their work
9 in numerous, you know, public art books. Whether it's these
10 pieces or not, the artists themselves I know do appear in a
11 lot of --

12 THE COURT: You don't know which ones specifically?

13 THE WITNESS: No.

14 Q (BY MR. EBERT) That's what I'm asking. These pieces at
15 issue, do you know if any of them have been the subject of an
16 article, a news story, anything in a book, any documentary,
17 any of these particular 24 works?

18 A Yes.

19 Q Which one?

20 THE COURT: Hold on. Let her answer the question.
21 What's wrong with that?

22 MS. CHANES: I wish he would stop badgering the
23 witness.

24 THE COURT: He's not badgering the witness, he's
25 just a little hyperventilating.

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1 MS. CHANES: Then I would ask him to take a breath.

2 THE WITNESS: Yes.

3 Q (BY MR. EBERT) Which one?

4 A I know my piece. I can speak about where my piece --

5 Q What article has this appeared that's about your piece?

6 Not that appeared in an article --

7 THE COURT: This is not a murder trial. This is not
8 a terrorist trial. Relax.

9 MR. EBERT: I understand, your Honor.

10 Q (BY MR. EBERT) About your piece?

11 A I know that it was featured in LargeUp.com, which is a
12 huge music blog and publication recording studio. They spoke
13 about the piece and they spoke about the event.

14 Q Did they critique the piece?

15 A I know that they really liked -- I would have to see the
16 articles, which I know we have here.

17 Q This is the article about your piece, and you don't
18 remember whether it critiques your piece?

19 A I mean, it came out about four months ago. I haven't
20 read it in four months, but they featured it because they
21 thought it was a great piece and, therefore, they covered the
22 event.

23 THE COURT: He wants to know whether they made any
24 comments about whether they thought it was of value. You read
25 the article; right?

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1 THE WITNESS: I did.

2 THE COURT: He wants to know what did the article
3 say?

4 THE WITNESS: I don't remember specifically about
5 that.

6 Q (BY MR. EBERT) Did Mr. Cohen ever tell you that he knew
7 all along that my client, when the time was right, was going
8 to knock down these buildings? Did he ever tell you that?

9 A No, he never said that.

10 Q Were you here yesterday?

11 A Yes.

12 Q You saw the video?

13 A Yes.

14 Q You saw him say that on the video; correct?

15 A Not to me.

16 Q You saw him say it on the video; correct?

17 A Yes.

18 Q But he never told you that?

19 A No.

20 Q Okay.

21 A We never had a discussion about it.

22 Q You put this up in September of 2013, your piece?

23 A The piece that's here?

24 Q The piece in the lawsuit.

25 A That was in July.

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1 Q July 2013?

2 A Uh-huh.

3 Q And before July 2013, had you heard any stories, had you
4 read anything that my client was planning on demolishing this
5 building?

6 A Yes.

7 Q So when you put up that piece that you intended to be
8 permanent, you knew that my client's plan was to knock down
9 that building within a matter of weeks; correct?

10 A No.

11 MS. CHANES: Objection.

12 THE COURT: What did you know about -- what did you
13 understand at the time was going to happen to the building?

14 THE WITNESS: We'd been hearing for years that
15 there's always a chance that the building can come down.

16 THE COURT: So you -- when you do this, you know the
17 building could come down?

18 THE WITNESS: But it was -- to speak bluntly, it was
19 a-boy-who-cried-wolf scenario.

20 THE COURT: I understand. Next question.

21 MR. EBERT: Were you aware that they were obtaining
22 approval to knock down the building at the time you put the
23 piece on the building?

24 THE WITNESS: Yes.

25 THE COURT: You knew that they were seeking

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1 approval?

2 THE WITNESS: Yes.

3 Q (BY MR. EBERT) Do you know what approvals they had
4 obtained by the time you put your piece on the building?

5 A No.

6 Q Did you do any research to find out?

7 A No.

8 THE COURT: Would it have made any difference -- if
9 you found out they got approval to tear the building down
10 within two or three months, would you still have done this?

11 THE WITNESS: Yes, of course.

12 THE COURT: Even if you knew the building was going
13 to come down?

14 THE WITNESS: Yes.

15 THE COURT: Why would you do that?

16 THE WITNESS: For the love of the art.

17 THE COURT: Even if it lasted for one week, or
18 two weeks or one month?

19 THE WITNESS: Hundreds of people come to 5Pointz
20 every single week.

21 THE COURT: There was knowledge out there in the
22 community that there were approvals that were being sought and
23 that -- we'll gain more about that from Mr. Wolkoff. But you
24 knew what was about to happen? You knew this was likely to
25 come down?

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1 THE WITNESS: Loosely.

2 THE COURT: What?

3 THE WITNESS: I knew loosely about it. Like I said,
4 we'd been hearing about it.

5 THE COURT: Go ahead. Anything else?

6 MR. EBERT: I'm sorry?

7 THE COURT: Anything else?

8 MR. EBERT: Yes, your Honor.

9 Q (BY MR. EBERT) Your real goal is to save 5Pointz as an
10 institution; correct?

11 A Uh-huh.

12 Q That's why you're here today; correct?

13 A Uh-huh.

14 Q I need a verbal yes or no.

15 A Yes.

16 Q So couldn't 5Pointz be done at another building in
17 Long Island City? Isn't it possible that somebody could say,
18 "I'm going to buy this building. I'm going to contribute it
19 to the 5Pointz people. Go put graffiti on the wall"? Is that
20 possible?

21 THE COURT: Everything's possible. That's always a
22 bad choice of words.

23 Q (BY MR. EBERT) But if that were done, you'd have artists
24 putting up graffiti on that building, and you could have
25 5Pointz at that building; correct?

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1 MS. CHANES: Objection.

2 THE COURT: The question is not appropriate. Next
3 question. It's argumentative. Let's go.

4 Q (BY MR. EBERT) Okay. All you need to put up graffiti is
5 a wall; correct?

6 THE COURT: I think we understand that.

7 MR. EBERT: Okay. Your Honor.

8 Q (BY MR. EBERT) Are you aware that at times artists at
9 5Pointz paint over other artists' work?

10 A Yes.

11 THE COURT: She's aware of that.

12 Q (BY MR. EBERT) If you took the same image and you did it
13 on the same wall, and you did it with the best quality oil
14 paint and the best quality aerosol paint, which would you
15 expect to last longer?

16 A On a wall, aerosol.

17 Q Would last longer than oil?

18 A Yes.

19 Q But you used aerosol for this art?

20 A Yes.

21 THE COURT: If you had another surface, would you be
22 able to reproduce it someplace else? May not exactly be the
23 same, but you probably could do that?

24 THE WITNESS: Technical, yes.

25 THE COURT: So if there was another wall available,

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1 you know, we could still see "Kool Herc." I can bring the
2 judges to see it; right?

3 THE WITNESS: Yes.

4 Q (BY MR EBERT) Do you know if any of Lady Pink's works
5 have been covered over at 5Pointz?

6 A I don't believe they have. I don't know. The one that's
7 up has been there for a very long time.

8 Q But you don't know if any others have been covered?

9 A I don't, no.

10 Q Did you go to her website before you came to testify to
11 what's on there?

12 A No.

13 Q Do you have any idea if the picture that plaintiffs are
14 trying to protect of hers is on her website?

15 A I don't know. No, I don't know that.

16 Q Did you go to any of the artists' websites, other than
17 your own, to check whether the pictures that they're seeking
18 to protect in this action are actually on their websites?

19 A No.

20 MR. EBERT: That's it, your Honor. Thank you.

21 THE COURT: Any further questions, Ms. Chanes?

22 MS. CHANES: I thought you guys had something else
23 at 11:00.

24 THE COURT: I do. I just want to know whether you
25 want to ask Ms. Mastrion any other questions.

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1 MS. CHANES: Not that I can think of right now.

2 THE COURT: Okay. Anyway, I enjoyed your testimony.

3 THE WITNESS: Thank you.

4 THE COURT: And you were very helpful to the Court
5 and I appreciate it.

6 THE WITNESS: Thank you. I will check the artwork
7 downstairs in the lobby.

8 THE COURT: Take a look at it. I want to know what
9 you say about it. You'll come back after the break. Go look
10 at the gallery and let me know what you think about it.

11 MS. CHANES: When do you want us back?

12 THE COURT: Our conferences are here?

13 THE CLERK: I have no idea.

14 THE COURT: So we're going to take a break. I have
15 a couple of conferences that should not take more than about
16 20 minutes or a half hour. Let's reconvene at quarter to
17 12:00. Go down to the cafeteria. Have a cup of coffee. Go
18 look at the artwork in the gallery, if you would like, and
19 we'll see you at quarter to 12:00. Okay.

20 MR. EBERT: Thank you, your Honor.

21 (Recess)

22 THE COURT: Did you have a chance to look at the
23 court's gallery?

24 THE WITNESS: Yes, I did.

25 THE COURT: Come up here and tell me what you think.

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1 THE CLERK: Is this on the record?

2 THE COURT: On the record. As I mentioned, I have
3 to decide what constitutes what is a recognized statute. The
4 aerosol work described the degree of difficulty, and what you
5 saw down in the court's gallery is not aerosol work, but how
6 do I decide whether that work is one that qualifies as work of
7 recognized stature, and I ask you the fact that the court has
8 it in its gallery, is that in and of itself sufficient or
9 other aspects of your concept of what you think is recognized
10 stature that I should reflect upon?

11 THE WITNESS: Well, the fact that the judge is a
12 collector --

13 MS. CHANES: I can't hear you.

14 THE COURT: It's the court gallery, open to the
15 public.

16 THE WITNESS: Yes.

17 THE COURT: Is that all they need to consider,
18 whatever they put up there, even if it's a bunch of dots that
19 would be recognized?

20 THE WITNESS: Technically speaking, before I saw who
21 the pieces were of and donated from, that the technical
22 ability is amazing on the pieces down there. I mean, the
23 color work, the detail, the intricacies of them. I wasn't
24 familiar with the artists, but I was very blown away.

25 THE COURT: Even if you didn't know the artist,

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1 whoever else, regardless, even if the artist is unknown, I
2 think you're telling me that that would be considered to be
3 something that would qualify as work of recognized stature?

4 THE WITNESS: Yes. It would be a tragedy to see any
5 of that work destroyed. It's beautiful work down there.

6 THE COURT: So it meets all those standards that you
7 spoke about before?

8 THE WITNESS: Composition. The color use is
9 amazing. You saw it from before you walked into the gallery.

10 THE COURT: So if the artist is well known or not,
11 it would just add to it, it would not subtract from it?

12 THE WITNESS: It would not subtract from it, it
13 would add to it more. I didn't know the artist, but the
14 quality of the work and the caliber of the work was a very
15 high level down there.

16 THE COURT: So you think the judges chose well?

17 THE WITNESS: Yes, one in particular.

18 THE COURT: Which one?

19 THE WITNESS: (Inaudible response)

20 THE COURT: All right. So we have a committee here
21 that does this.

22 THE WITNESS: Yes.

23 THE COURT: And so, you know, you may, maybe not,
24 know that the all the courthouses are required to have some of
25 its work devoted to the arts, the outdoor statues. Each

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1 courthouse has a work of art outside. GSA, the government
2 services, commissions artists. They pay a lot of money. Some
3 of them I like, some of them I don't like. And then the
4 interior of the courthouse is also public space, so, you know,
5 we pride ourselves on trying to expose the public to works of
6 art, especially by local artists. But maybe we should have
7 some of this other work that the judges don't know about in
8 the gallery somehow.

9 THE WITNESS: Yes. You can cover the -- you can get
10 all four of those walls, the whole entryway covered in a
11 mural, you know --

12 THE COURT: So, you know, it's just interesting to
13 have the benefit of having -- I'm going to ask the other
14 experts whether they concur in their assessment. That's
15 helpful, to give me some guidance.

16 Anybody want to question Ms. Mastrion? I don't
17 think we have to.

18 MS. CHANES: I have nothing further.

19 MR. EBERT: Just one question, your Honor.

20 THE COURT: Sure.

21 CROSS-EXAMINATION (RESUMES)

22 BY MR. EBERT:

23 Q If a piece were to meet the six factors that you have
24 spoken about and no one ever saw it, but it met all those six
25 factors, amazing piece, but no one saw it, it was in

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1 somebody's attic, would that have recognized stature?

2 A I believe it would, yes.

3 MR. EBERT: Thank you.

4 THE COURT: So just intrinsic quality of the work,
5 even if it's not exposed to the public, would still qualify,
6 in your opinion, as something that should satisfy the
7 statutory standard of the status, so to speak?

8 THE WITNESS: A beautiful piece of work, is a
9 beautiful piece of work.

10 THE COURT: So the fact that it's been exposed to
11 the public, you don't think it necessarily is a factor or a
12 consideration?

13 THE WITNESS: I think it is. I think it elevates it
14 even more.

15 THE COURT: Even without that, it would still
16 qualify?

17 THE WITNESS: Yes.

18 THE COURT: Interesting.

19 THE WITNESS: I think it just elevates it even more.

20 THE COURT: Thanks a lot.

21 THE WITNESS: Thank you.

22 THE COURT: So what do we have next?

23 MS. CHANES: We have another one of the
24 plaintiff's -- Mr. Luis Lamboy.

25 THE CLERK: Good afternoon, Mr. Lamboy. Take the

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1 witness stand.

2 THE WITNESS: Good afternoon.

3 THE CLERK: Remain standing and raise your right
4 hand. Do you solemnly affirm the testimony you're about to
5 give to the Court in this proceeding will be the truth, the
6 whole truth and nothing but the truth?

7 THE WITNESS: I do.

8 THE CLERK: Please have a seat. Please state and
9 spell your name.

10 THE WITNESS: Luis Lamboy Jr., L-a-m-b-o-y. Luis is
11 L-u-i-s.

12 THE COURT: I just want to make one mention on the
13 record that the work that you were referred to downstairs,
14 the artist's name is Bernard Aptekar, A-p-t-e-k-a-r. So now
15 you know who he is.

16 MS. CHANES: How long do these exhibits run,
17 your Honor?

18 THE COURT: Run about three months, roughly.

19 MS. CHANES: Permission to approach with famous
20 binders?

21 THE COURT: Go ahead.

22 DIRECT EXAMINATION

23 BY MS. CHANES:

24 Q Mr. Lamboy, you're one of the plaintiffs in this action;
25 correct?

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1 A Yes.

2 Q Could you tell the Court a little bit about your
3 educational background quickly.

4 A Full scholarship to FIT in the 80s. After that, I went
5 into the field textile designing, and then -- that was for
6 three years, and then I was a professional art handler for
7 Sotheby's Auction House for 18 years.

8 Q And in your job with Sotheby's, did that involve any
9 evaluation or critiquing of artworks?

10 A No.

11 Q And are currently a professional artist?

12 A Yes.

13 Q That's how you make your living?

14 A Yes.

15 Q Do you have any works of visual art at 5Pointz now?

16 A Yes.

17 Q Does that include the "Blue Jay Wall"? Would you look at
18 the exhibit in front of you, the binder, the green binder.

19 A Uh-huh.

20 THE COURT: Do you want to put that up on the screen
21 again?

22 THE WITNESS: Sure, why not.

23 THE COURT: Go ahead. Let's take a look at it.

24 MS. CHANES: I found all my exhibits.

25 THE COURT: Okay. You've got it. And that's A --

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1 MS. CHANES: That's A9.

2 THE COURT: A9 is your work.

3 THE CLERK: You want me to dim the lights for you?

4 Q (BY MS. CHANES) With respect to this work, when you
5 painted it -- this is to the loading dock area?

6 A Yes.

7 Q When you painted it, was there a work of art under that?

8 A Yes.

9 Q Whose work was under it?

10 A It was my work.

11 Q And were you the one who made the decision to paint over
12 the previous work?

13 A Yes.

14 Q Why?

15 A Because the work was starting to get damaged by the
16 trucks that were going into the loading dock, as well as the
17 trash cans; they would push up against it.

18 Q So that happened a lot at that location?

19 A It happens.

20 Q And the work you painted over, did that also cover a work
21 of visual art?

22 A Yes.

23 Q And who painted the work of visual art?

24 A I did.

25 Q And, again, did you make the decision to paint over it?

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1 A Yes.

2 Q Did you make that decision yourself or was that made for
3 you?

4 A I made that decision.

5 Q Now, with respect to "Blue Jay Wall," do you have a
6 picture of this in your portfolio?

7 A Yes.

8 Q Could you recreate this wall somewhere else if you wanted
9 to?

10 A No.

11 Q Why not?

12 A It wouldn't come out exactly the same way. You'd have
13 the shapes of the actual building that's actually a part of
14 the wall, and I never duplicate my works. I like to have my
15 works to be one of a kinds.

16 Q So if somebody requested you to paint this wall somewhere
17 again, you wouldn't do it?

18 A I wouldn't do it.

19 Q Do you have any other works of visual art currently at
20 5Pointz?

21 A Yes, I do.

22 Q And are those pictured in the -- this binder? Are they
23 part of the section?

24 A They're not part of the section.

25 Q When you paint -- strike that. How many other works of

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1 visual art do you have?

2 A About five or six.

3 Q Were any of those painted over previously existing
4 artwork?

5 A No.

6 Q So they were all painted over blank surfaces?

7 A Yes.

8 Q And are they permanent to your way of thinking?

9 A Yes.

10 Q Are they on the upper floors of 5Pointz?

11 A Yes, they are.

12 Q Now, do you recall -- do you recall participating in
13 an -- participating in an interview around -- a videotape
14 interview, in approximately 2010, regarding your work as an
15 aerosol artist?

16 A Yes.

17 Q Do you recall that, as part of that testimony --

18 MR. EBERT: Objection, your Honor. We have a
19 witness.

20 THE COURT: That's an improper type of question. As
21 a lawyer, you should know that. What do you want to ask him?

22 MS. CHANES: I want to ask him whether -- he was not
23 here yesterday, so I cannot ask him about --

24 THE COURT: Just what do you want to try to illicit
25 from him?

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1 Q (BY MS. CHANES) Okay. Do you currently feel like as
2 long as you have a picture of your artwork, you don't care
3 what happens to the original mural?

4 THE COURT: That's not a good question.

5 MR. EBERT: Objection.

6 BY THE COURT:

7 Q Look, you have this -- this wall may come tumbling down.
8 I think you properly realized there was some risk of that
9 happening. When you put this up, did you think there was a
10 risk the walls would be come tumbling down?

11 A No.

12 Q You thought forever?

13 A Yes. When I did this one, it was before I heard that the
14 building was coming down.

15 Q So at the time you did it, what was your understanding of
16 what was going to happen with the walls?

17 A With this particular wall, I thought that it would stay
18 up there until I decided that I wanted to go over it again.

19 Q What is the owner of the property supposed to do? Not
20 use his property and keep the wall up?

21 A Well, I did not know that they were going to tear it town
22 at all.

23 Q You had no knowledge one way or the other?

24 A No, not until this year.

25 Q When you paint on walls, you realize it's not the same as

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1 a canvas that's going to be preserved in a museum; right?

2 A Yes.

3 Q Okay. Did you at least try to, you know, take any
4 pictures or to preserve this in some other medium?

5 A Yes.

6 Q You have photographs?

7 A Photographs.

8 Q Good quality photographs?

9 A Pretty good.

10 Q All right. So then if I decide that the builder has the
11 right to, you know, tear the wall down, which I probably will,
12 I think, will I be able to see maybe this wonderful work of
13 art someplace else?

14 A Yes, on my website, hopefully books, and --

15 Q So it's preserved?

16 A Yeah.

17 Q And you can do this, I guess, on another wall, if
18 Mr. Wolkoff, let's say, hypothetically, made another space
19 available? You can't reproduce it exactly, but, in essence,
20 you can have something like this that you can recreate?

21 A I can do something close but never recreate --

22 Q Never exactly the same, but the public will still be
23 drawn to it?

24 A Yeah.

25 THE COURT: I just want to get a feel for this.

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1 Anything else you want to ask?

2 MS. CHANES: Two more questions.

3 Q (BY MS. CHANES) One is will you do that? Will you
4 recreate this wall or do your best to recreate it somewhere
5 else?

6 A I would not recreate it.

7 THE COURT: You would do something else?

8 THE WITNESS: I would do something else.

9 THE COURT: And the reason why is you don't want to
10 recreate what you've already done?

11 THE WITNESS: Yes, I like my works to be one of a
12 kinds.

13 THE COURT: What if the public wanted to see it?
14 Would you accommodate that?

15 THE WITNESS: I probably wouldn't. Because, I say,
16 this wall was done a year ago. As an artist, I have grown,
17 and I can do something maybe even better.

18 THE COURT: Okay. Anything else?

19 MS. CHANES: One other question.

20 Q (BY MS. CHANES) As part of your career as a professional
21 artist, do you also do commission work?

22 A Yes, I do.

23 Q Could you give the Court just one or two examples of your
24 commission work?

25 A I just recently got commissioned by the U.S. Consulate to

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1 go to Ecuador and work with their local artist on some mural
2 projects.

3 BY THE COURT:

4 Q Outside projects?

5 A Yeah, exterior.

6 Q What are they planning to do down there?

7 A They actually have a big art community, and they wanted
8 to do mural work out there.

9 Q On government buildings?

10 A Not government buildings, but buildings that are in the
11 community. Some were poor areas and some were up-and-coming
12 areas.

13 Q Do they work our arrangements with the owner to allow
14 that to happen?

15 A Yes, before I go.

16 Q And do you know whether or not they're going to be
17 permanent or temporary?

18 A From what I understand, they're permanent.

19 Q These buildings will not be taken down?

20 A Yes. They're actually -- when I went out there, they
21 were pretty new buildings.

22 Q You don't know who owns those buildings?

23 A Never.

24 THE COURT: Anything else?

25 MS. CHANES: Nothing further for this witness.

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1 THE COURT: You want to inquire at all?

2 MR. EBERT: Yes. Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. EBERT:

5 Q Did Mr. Cohen ever tell you that he knew all along that
6 my client's plan was to demolish the buildings when the time
7 was right?

8 A No.

9 Q And when you did "Blue Jay Wall," you said you were
10 unaware that my client was working to get the building
11 demolished to put up a project?

12 A That's correct.

13 Q Have you ever participated in any "Save 5Pointz" events?

14 A No.

15 Q Have you ever heard the phrase "Save 5Pointz"?

16 A Yes.

17 Q When's the first time you heard it?

18 A December.

19 Q And when is the first time that you learned that my
20 client intended to demolish the building?

21 A The first time was at a meeting that happened in PS1.

22 Q When was that?

23 A Probably the summertime. I'm not too sure.

24 Q Of this year?

25 A Yes.

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1 Q Is it true -- your lawyer was talking about this video.
2 And in that video you say to the interviewer --

3 MR. EBERT: You know what, can we play that one
4 clip?

5 THE COURT: We don't have to do that. I already
6 heard it.

7 MS. CHANES: Actually, I don't think they played
8 that one, your Honor.

9 MR. EBERT: I didn't play that one.

10 THE COURT: Something else you want to offer into
11 evidence?

12 MR. EBERT: Yes, it's very short.

13 THE COURT: What is it?

14 MR. EBERT: It's a video on which the witness says,
15 "If somebody paints over this, his own work, tomorrow, I'm
16 okay as long as I have a photo."

17 THE COURT: It's a video made by --

18 MR. EBERT: It's an interview that was done of the
19 witness.

20 THE COURT: Of this witness. Mark that as an
21 exhibit. You have a label?

22 MR. EBERT: Thirty-three, your Honor.

23 THE COURT: In evidence, Defendant's Exhibit 33.
24 Let's hear it.

25 MS. CHANES: Do you have a copy of that?

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1 MR. EBERT: No.

2 MS. CHANES: May I have a copy of that?

3 MR. EBERT: No, it's a video.

4 THE COURT: Let's listen to it. Is Mike Innelli
5 here?

6 MR. KNAUSS: He stepped out.

7 MR. EBERT: Is he coming back?

8 THE COURT: I hope he does. Ask him some other
9 questions, in the meantime. You can try to find Mike. This
10 is also Mike. We have two Mikes.

11 MR. KNAUSS: I'll go find the one who knows what
12 he's doing.

13 THE COURT: Perfect.

14 (Video played.)

15 Q (BY MR. EBERT) That was obviously you; correct?

16 A Yes.

17 Q Did you say you've never painted over someone else's work
18 at 5Pointz?

19 A I painted over other works.

20 Q Other artists' works?

21 A Yes.

22 MR. EBERT: I think this will be helpful to
23 the Court if we just show the last part of the video, where it
24 shows the witness, how he covers over a work and paints over
25 it with something else. I think it's pretty brief, but I

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1 think it illustrates the paint.

2 (Video played.)

3 Q (BY MR. EBERT) Is that your work you're about to paint
4 over?

5 A No.

6 MS. CHANES: Is that you?

7 THE WITNESS: No.

8 THE COURT: Well, I know that it was painted over.
9 I mean, go ahead. He's not in this, is he?

10 MR. EBERT: It's the interview where he says he's
11 painting it over. If he denies it's him, then I'll move over,
12 your Honor.

13 THE WITNESS: That's not me.

14 MR. EBERT: It's the same video.

15 THE COURT: We don't need to do this.

16 MR. EBERT: Okay. Thank you.

17 THE COURT: Let's go. Anything else of this
18 witness? We don't need more.

19 MR. EBERT: That's him on the ladder.

20 THE COURT: Is that you on the ladder?

21 THE WITNESS: Yes.

22 THE COURT: I've seen it before. It's not going to
23 make a difference. Go ahead. Anything else?

24 MS. CHANES: Nothing further, your Honor.

25 THE COURT: Thank you very much. Keep up the good

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1 work.

2 THE WITNESS: Thank you.

3 THE COURT: Do you have anything else other than
4 your expert?

5 MS. CHANES: No, we don't, other than Mr. Simmons
6 tomorrow. We're going to take our lunch break now.

7 And will you have something for us at 2:00 o'clock,
8 perhaps?

9 MR. EBERT: Yes, your Honor.

10 THE COURT: Who will we be hearing from?

11 MR. EBERT: Erin Thompson, our expert.

12 THE COURT: He was the curator.

13 MR. EBERT: She. Well, her background is in art
14 history, and she's an art crimes professor now at John Jay.

15 THE COURT: Do you have anything else in addition to
16 her?

17 MR. EBERT: Mr. Wolkoff.

18 THE COURT: I'm anxious to hear from him, of course.
19 Have your expert take a look, to get his opinion on that as
20 well. See you at 2:00 o'clock.

21 MS. CHANES: If I may have a copy of your expert's
22 bio or resume?

23 MR. EBERT: I don't have one.

24 She's going to testify to her credentials,
25 your Honor.

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1 THE COURT: But usually you turn this over to
2 counsel. Well, you must have something. See whether you can
3 accommodate her.

4 MR. EBERT: You had her name since yesterday.

5 THE COURT: Look, let's not put it on the record.

6 (Lunch recess.)

7 THE COURT: Ready to continue?

8 MS. CHANES: Yes, your Honor.

9 THE COURT: All right. So who do you have now,
10 Mr. Ebert?

11 MR. EBERT: Motion for directed verdict.

12 THE COURT: Okay. Denied.

13 MR. EBERT: Okay. Erin Thompson, please.

14 THE COURT: "Directed verdict" is not the right
15 phrase. That's what happens after the trial. This is an
16 application for preliminary injunctive relief. There's no
17 such animal for directed verdict, just thought I'd let you
18 know.

19 MR. EBERT: I know it was a complete -- I'll move
20 on.

21 THE COURT: You're a very conscientious lawyer.

22 THE CLERK: At this time ask you to remain standing.
23 Raise your right hand. You're affirming the testimony you're
24 about to give to the Court in this proceeding will be the
25 truth, the whole truth and nothing but the whole truth?

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1 THE WITNESS: Yes.

2 THE CLERK: Please have a seat and please state and
3 spell your name.

4 THE COURT: You don't have to have it that close.

5 THE WITNESS: I have the plague, so I'm afraid I'll
6 lose my voice. Is that all right?

7 THE COURT: Is that okay for you?

8 THE WITNESS: Uh-huh.

9 THE COURT: You don't have to swallow it. Okay.
10 And we don't want to hear your tonsils.

11 THE WITNESS: Nobody wants to hear that.

12 THE COURT: Have you ever testified in court before?

13 THE WITNESS: I have not.

14 THE COURT: First time?

15 THE WITNESS: Yes.

16 THE COURT: Okay. So we have your name and we know
17 you are, once again, who?

18 THE WITNESS: Erin Thompson, E-r-i-n,
19 T-h-o-m-p-s-o-n.

20 THE COURT: So let's have Mr. Ebert question you.

21 MR. EBERT: Thank you, your Honor.

22 DIRECT EXAMINATION

23 BY MR. EBERT:

24 Q Where do you work?

25 A I am currently an assistant professor of art law and art

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1 crime at John Jay College.

2 THE COURT: John Jay has an art department?

3 THE WITNESS: They do.

4 THE COURT: A big one?

5 THE WITNESS: No.

6 THE COURT: A small one.

7 THE WITNESS: There's about eight professors.

8 THE COURT: Are they up at 57th Street? Is that
9 where you were?

10 THE WITNESS: Uh-huh.

11 Q (BY MR. EBERT) What course or courses do you teach now?

12 A Currently this semester, I'm teaching modern art and the
13 survey of art history, both with a focus on art crime.

14 THE COURT: Art crime.

15 THE WITNESS: Uh-huh.

16 THE COURT: What is art crime?

17 THE WITNESS: Well, that's -- it's a broad field
18 that encompasses all of the interactions between art and
19 criminal behavior. So, for example, Nazi looted art, or
20 destruction of art during wartime. I specialize, in
21 particular, in the looting and smuggling of antiquities.

22 THE COURT: What about all those 1500 artworks that
23 suddenly surfaced this week in Germany.

24 THE WITNESS: Germans didn't destroy them all.

25 THE COURT: What do you make of that? Why were they

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1 preserved and others destroyed?

2 THE WITNESS: The Germans sought to rid their
3 society of what they considered to be degenerate modern art,
4 so they burned a few, and then they realized why not fund the
5 war effort by selling these to foolish other people outside of
6 Germany. So, apparently, these paintings were kept by an art
7 dealer who was charged by the Nazis with selling them, but he
8 scammed the Nazis and kept a few.

9 THE COURT: So he was a good art dealer? He
10 preserved them?

11 THE WITNESS: He should have given them back after
12 the war, but --

13 THE COURT: Took him awhile to do that. Why did it
14 happen now? This has nothing to do with this case. I'm just
15 curious since you're an expert.

16 THE WITNESS: I believe in that case the current
17 holder of the apartment was charged with tax evasion for
18 selling these -- a few of these works of art to make a living,
19 so there was a raid on his apartment.

20 THE COURT: He kept them secret all these years
21 because of that?

22 THE WITNESS: Uh-huh.

23 THE COURT: Do you know who the person is, by any
24 chance?

25 THE WITNESS: I don't remember his name, but he's an

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1 art dealer, so his father, I believe, was the one who worked
2 with the Nazis.

3 THE COURT: What is likely to happen to them now?

4 THE WITNESS: It depends on what their ownership is.
5 Germany is now very invested in returning art to Jewish
6 families. Some of them may have come from German national
7 museums, and in which case, they would just go back to the
8 museums.

9 THE COURT: They're safe now, safely preserved, and
10 whoever ultimately gets them back will be determined. It's
11 not like aerosol art; right?

12 THE WITNESS: (Inaudible response)

13 THE COURT: Good.

14 Q (BY MR. EBERT) Can you tell us about your educational
15 history after high school, please?

16 A So I received a Bachelor's degree in the History of Art
17 from Barnard College. Then I went to graduate school at
18 Columbia, where I received a JD from Columbia Law School, and
19 a Master's in Art, and a Master's in Philosophy, and a PhD in
20 Art History from Columbia.

21 Q And can you tell us --

22 A And a graduate of School of Arts and Sciences.

23 Q Can you tell us about your work during and after college?

24 A Yes. So during graduate school, I interned for the legal
25 departments of the Guggenheim Museum and the Philadelphia

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1 Museum of Art, and I also taught as an adjunct instructor, art
2 history, at Columbia, Pace, Suny, Rutgers, Brooklyn College.

3 THE COURT: Am I to deduce from that that you have a
4 hard time keeping a job?

5 THE WITNESS: You're to deduce the struggle of
6 adjunct professors who are hired for semesters only.

7 THE COURT: Are you now full professor?

8 THE WITNESS: Now, I am, yes. This is my first
9 semester as a full-time professor. Prior to this, after
10 graduating from law school, I worked for Hogan Lovells as an
11 associate, a private law firm, and then worked for the city,
12 for the Conflicts of Interest Board, as an agency enforcement
13 attorney.

14 THE COURT: Did you know all of the partners at
15 Hogan Lovells?

16 THE WITNESS: No.

17 THE COURT: Ever come across Steve Edwards?

18 THE WITNESS: Yes. I worked for him, yes.

19 THE COURT: He's a good musician.

20 THE WITNESS: He played at the Christmas party.

21 THE COURT: Small world. All right. Go ahead.

22 Q (BY MR. EBERT) Are you a member of any art-related
23 professional organizations?

24 A Yes, I'm a member of the College Art Association, which
25 is a professional association for college art professors and

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1 also the International Commission of Museums, which is a
2 UN-related organization.

3 Q Written articles about art?

4 A Yes. Most recently I published an Op-Ed in the
5 L.A. Times last month about the looting of Syrian antiquities
6 during the conflict there. I've published articles on tax
7 deductions for the donations of looted art and the return of
8 Nazi-looted art. And forthcoming from the Oxford Encyclopedia
9 of Art Esthetics, I have an article on the deliberate
10 destruction of art.

11 THE COURT: You're an academic, basically. Are you
12 also an artist yourself?

13 THE WITNESS: No, your Honor. I enjoy and criticize
14 but do not produce.

15 THE COURT: You're a critic but not a participant;
16 right? I just want to get a sense, because the other folks
17 who were here actually are caught up in actually being
18 artists.

19 THE WITNESS: Uh-huh.

20 THE COURT: But this is not your bet. Strictly
21 academic.

22 THE WITNESS: (Inaudible response)

23 THE COURT: Correct?

24 THE WITNESS: Correct.

25 THE COURT: Go ahead.

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1 Q (BY MR. EBERT) And are there any styles of art that
2 you're most interested in?

3 A I specialized, did my dissertation in ancient Greek and
4 Roman art, but during both my graduate and undergraduate
5 studies and teaching career, I've had to study and teach all
6 areas of art from keeth (phonetic) painting to contemporaries,
7 as they say.

8 Q And within contemporary art, are there any particular
9 styles or movements that you have taught?

10 A Yes. I frequently teach modern and contemporary art with
11 the main style such as Pop Art, minimalism, happenings and so
12 on.

13 BY THE COURT:

14 Q Pop Art, what does that incorporate? Would that include
15 aerosol work or any type of work like that when you say "Pop
16 Art"?

17 A The beginning of aerosol art -- we were using the term in
18 the 1980s -- did overlap with Pop Art, and many well-noted and
19 respected aerosol artists have also been generally categorized
20 by fellowship as Pop Art.

21 Q I'm interested, because you know a lot more than I do.
22 I'm just here trying to get better educated and you can help
23 me. So I'm trying to get a handle on things like Pop Art,
24 graffiti art, aerosol art. I hear all these phrases being
25 bandied about, so I ask you, you know, is there a difference

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1 between Pop Art and aerosol art -- is one incorporated in the
2 other? Is aerosol art simply a current modern type of advent,
3 or does it have a stark basis to it? I'd like to know a
4 little bit about that from your expertise.

5 A How long have you got?

6 Q I've a lifetime appointment.

7 A So in the 1960s, 70s and 80s, a generation of artists
8 decided that they were -- no longer wanted to be beholden to
9 the museum system, to, you know, hoity-toity, highfalutin
10 critics; they wanted to speak directly to the people.

11 Q To the public.

12 A To the public. So a number of artists began doing things
13 like going out and conducting performances in public, where
14 unsuspecting members of the public would become unconscious
15 participants and bystanders.

16 Q You call that "performance art?"

17 A Performance art.

18 Q Street musicians type of things?

19 A Sometimes even more intrusive and startling than that.
20 Sometimes the goal was to shock the public. There also began
21 to be a number of artists who would perform unauthorized
22 modifications of public buildings. Say, like, Mada Clark, in
23 the 1970s, would go and cut holes in abandoned warehouses
24 in -- the piers along the West Side.

25 Q That's not lawful, that's creating a building.

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1 A Uh-huh. But the unlawfulness was almost part of the
2 point. These artists who wanted to interact directly with the
3 public often have subversive, antiestablishment message. So
4 the idea was to put work out there for people to encounter
5 that would shock them out of their normal thoughts.

6 Q Was there a particular phrase that would describe that
7 type of work?

8 A It's usually known as street art.

9 Q Street art?

10 A Which has several pertinent characteristic. And graffiti
11 art or aerosol artists are part of this larger umbrella.

12 Q Tell me about the advent of so-called, what I refer to
13 as, "aerosol art" because graffiti is against the law if you
14 don't have the owner's permission, broadly defined; is that
15 correct? Graffiti is anything at all put on a building
16 without the owner's permission?

17 A I would say, yes. But the phrase "graffiti art" is a
18 phrase usually that refers to the more artistic end of any
19 sort of marking on a building, whether legally --

20 Q I want to know about that. Is there a difference between
21 aerosol art and graffiti art? I mean, what's the phrase that
22 I should use in this case?

23 A The one I see in the literature most frequently is
24 "graffiti art." I searched for the term "aerosol art," which
25 plaintiffs use, and saw only a limited number of, a few. But

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1 to me they're more or less synonymous.

2 Q The plaintiffs themselves refer to many times as
3 "graffiti art." I'm the one that's talking about
4 referring to aerosol art, because they use aerosol. I guess
5 graffiti could be aerosol plus anything else; right?

6 A Uh-huh.

7 Q So here we're talking about this particular way in which
8 this work is created by using aerosol paint or spray; right?

9 A (Inaudible response)

10 Q Would it be acceptable to refer to this as aerosol art?

11 A I think so, in the same way we refer to oil painting or
12 water color.

13 Q Can you give me some idea of the etymology of history of
14 when this type of stuff started to appear and what its reach
15 is today in our culture internationally? Domestically?

16 A To go very far back, to my classical education, graffiti
17 is -- from the Latin, it just means "writings." So ancient
18 graffiti survives from Pompeii and Herculean -- and has some
19 of the same sort of content as graffiti does now.

20 Q They were painted on the walls way back then?

21 A Mostly the ones that survived were scratches but also
22 paintings.

23 Q Historical basis to this?

24 A Yes, this form, it seems to be a human impulse to leave
25 one's name or thoughts on the walls for others.

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1 Q So going back to the days of the Greeks and the Romans, I
2 mean, was there an acceptable concept to -- we know that there
3 are paintings on caves, and walls and everything like that. I
4 guess that's because there were no canvases. And I'm
5 wondering from a historical aspect where all this stems from?

6 A Excuse me. There have been long impulses to -- I mean,
7 plaintiffs talked about mural painting, so the idea of
8 transforming a wall into a work of art certainly has, along
9 that basis -- although most of those murals, frescos, oil
10 painting on walls have been meant to endure for a long time.
11 Leonardo Da Vinci's "The Last Supper" is an oil painting in
12 Milan on the wall.

13 Q I thought so.

14 A And it's an oil painting that's been there for more than
15 500 years.

16 Q Is that the La Scala?

17 A Nearby.

18 Q So that's on the wall?

19 A Correct.

20 Q And that's been preserved through history?

21 A Correct.

22 Q With some difficulty, I guess?

23 A With some difficulty. The entire building was bombed
24 during World War II.

25 Q That's one of the ways it can disappear, but right now

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1 it's become, I guess, a public monument, I guess. It's owned
2 by the city?

3 A The church, which it's in.

4 Q So they preserve it. How about now? Let's fast forward.
5 So you have a lifetime appointment. I want to try to get this
6 done and over today, in terms of getting your testimony.
7 Where have -- these folks here -- you know what this is all
8 about. We've been showing you these 24 pictures, and we hear
9 about these artists who talk about expressing themselves in
10 this format, and I'd liked to know the history and the
11 background. Is it more common today? If there's a movement
12 today and, if so, what's it all about?

13 A Yes, sir. The 1970s and 80s are what are considered to
14 be the peak of graffiti art, aerosol art, street art of this
15 type. When the artists took spray paint as a medium, that
16 would allow them to quickly portray messages directly to the
17 public.

18 Q You think that's something that's of artistic value or
19 something that's relevant to our society and our culture?

20 A Well, as modern art has shown, anything and everything
21 has potential to be art, but I think it's generally understood
22 that spray paint used as an innovative art form of widespread
23 public recognition has greatly declined since the 1980s, so in
24 preparing for this case, I can think of only one contemporary
25 street artist with widespread public recognition.

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1 Q You have been to 5Pointz? It's kind of unique. You look
2 at that, and it gets your attention right away. A lot of
3 people have seen it. Apparently they come from all over the
4 place to see it; is that correct?

5 A Correct.

6 Q What's all that? How does that fit into the scheme of
7 things, in terms of the concept of art and its relevancy to
8 our society?

9 A Well, I think 5Pointz is a good example of the essential
10 characteristics of street art. First, in that it is a
11 competitive art form, so the people that are coming to visit
12 are coming to see the newest, the latest, the greatest not the
13 old master, so to speak. Second, it's characteristic in that
14 it's directly addressed to the public, and the public can
15 react to it as it will. It can ignore it. It can bang trash
16 cans against it. It can mutilate it. Street art is meant to
17 be ephemeral art form, which is documented upon its creation;
18 photographs, videos, and then left to developments, to the
19 public, to the public authorities, to do with it as they will.

20 Q As an expert, what do you think in that regard? Is it
21 something worthy for recognition, perhaps?

22 MS. CHANES: I'm sorry, your Honor. I'm sorry to
23 interrupt. With all do respect, I object to her being
24 qualified as an expert. I don't think the foundation's been
25 laid for her expertise.

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1 THE COURT: You have your objection.

2 Answer my question now.

3 THE WITNESS: Are you speaking street art as a
4 genre, 5Pointz in particular or these particular works?

5 THE COURT: I'm going to let you question her. I
6 mean this is not normally what I do in a trial. This is
7 something I'm treating a little bit out of the box.

8 MS. CHANES: I understand. I think she might
9 benefit from water, benefit by taking some of the --

10 THE WITNESS: Am I not hearable?

11 THE COURT: She's doing fine. I'm interested in
12 getting educated here.

13 MS. CHANES: I understand. I think her throat's
14 bothering her.

15 BY THE COURT:

16 Q Do you remember the question I just asked you?

17 A Yes. You want to know about the relevance, and I asked
18 if you're interested in the relevance of street art as a genre
19 or 5Pointz as a site.

20 Q You can talk to me about 5Pointz a little bit.

21 A So 5Pointz, I think, has been an interesting site for
22 street art, but it's merely one of a number of sites, and it's
23 interesting to the public as a changing display, a changing
24 gallery. You said it attracts people's attention. Just in my
25 own example, I had frequently passed it on the way to PS1

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1 across the street. I looked at it. I noted their graffiti,
2 but I hadn't known that there was any organization there.

3 Q Catches your eye?

4 A Catches your eye, but so do many displays of graffiti.

5 Q But, apparently, a lot of people come to see this. We've
6 heard testimony about how attractive it is. Corporate people
7 come to look at it, school children. People come from all
8 around the world, so it has received that type of recognition,
9 I suspect; right?

10 A That is true, but the attention of a subculture does not
11 satisfy, in my opinion, the recognition required by VARA.

12 Q All right. So you've been asked to come here to give
13 expert testimony on recognized stature?

14 A Correct.

15 Q What specifically were you asked by Mr. Ebert to opine
16 about?

17 A The history of art in general and destruction of art,
18 vis-à-vis, art law, and perhaps specifically some thoughts
19 about VARA.

20 Q All right. So when -- you were asked to opine as to what
21 would constitute the work of recognized stature on this
22 particular statute that I have to grapple with.

23 A Yes, your Honor.

24 Q You have a sense of how the court goes about deciding
25 what work is a work of recognized stature?

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1 A I have a sense how courts have gone about that issue.

2 Q I don't think there's a lot of courts that have addressed
3 this, have they?

4 A No, your Honor.

5 Q Tell me what you know about that, and let's segue way
6 from that into what we're talking about here.

7 A Your Honor, I'm sure, is well aware the statute does not
8 define.

9 Q Doesn't define it. Where did it come from, this phrase?
10 Somewhere it came full blown in 1990?

11 A Correct, your Honor. So I believe -- in my opinion,
12 there are three ways of dealing with the definition of --

13 Q Do you know what Congress had in mind when they enacted
14 that?

15 A The legislative history, case law --

16 Q Tell me about it.

17 MS. CHANES: If I may, your Honor, I'm sorry, I need
18 to get another objection on the record. She's here as an art
19 expert and not a legal expert.

20 THE COURT: You can make all the objections you
21 want, if you so feel inclined. You can let the record reflect
22 that you object to everything that I'm doing.

23 MS. CHANES: I don't.

24 THE COURT: You can raise your objections.

25 Answer my questions.

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1 THE WITNESS: So if -- looking at legislative
2 history, we see that the first draft of the bill was
3 introduced without this recognized stature language, that all
4 works of art under the first draft would receive protection.

5 THE COURT: Whether she's technically an expert or
6 not, you know, she's my expert now. I need help.

7 MS. CHANES: I understand.

8 THE COURT: So I'm going to use her while I have her
9 here. Because I can appoint people, as you know, under the
10 statute; right?

11 MS. CHANES: I understand.

12 THE COURT: In areas where the Court doesn't have
13 expertise, so I'm going to use her for those purposes.

14 MS. CHANES: I just need to make the record.

15 THE COURT: Go ahead.

16 THE WITNESS: So --

17 THE COURT: Doesn't mean I'll agree with them.

18 MS. CHANES: Understood.

19 THE WITNESS: During the drafting, and debate and
20 voting of this law, it was recognized by other members of
21 Congress that a right against destruction was deeply
22 antithetical to the uninal trend of the United States Property
23 Law, so the phrase "recognized stature" was put in as a higher
24 bar, so not just all works of visual art would receive this
25 protection, only works of recognized stature. And the court

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1 recommended that decision makers, such as your Honor, consult
2 art experts, collectors --

3 BY THE COURT:

4 Q It's not my standard. I have to look at this. It's very
5 attractive and it appeals to me, but that's irrelevant because
6 I'm not the expert.

7 A And the reason why this higher bar was put in was to --

8 Q It's a balance?

9 A To balance. The public's interest in preserving a work
10 that is publically valuable versus the property.

11 Q So it deals with the destruction, but it's also possible
12 mutilation, this concept of the moral integrity, what does
13 that mean?

14 A VARA has three main rights. All works of art receive the
15 right of attribution, so if an artist decides they want to
16 remove their name from association with a work, it was a
17 juvenile work, it's been restored badly, they can ask people
18 to remove their name from display while displacing the work of
19 art. The second right under VARA is the right against
20 intentional distortion, modification or mutilation if that
21 change would harm the artist's reputation.

22 Q If it harms reputation?

23 A Yes.

24 Q And so if I owned a work of art and I decided to, you
25 know, put a cross over it or paint over it, would I have the

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1 right under the statute to do that? Would that be something
2 that would violate the statute even though I'm not the owner?

3 A The question would be whether what you did to the work of
4 art harms the artist's reputation?

5 Q It would have to be seen? If I had this in my private
6 collection, if nobody saw it, then I can't harm the artist's
7 representation?

8 A Correct. Or if the artist is not very well known,
9 doesn't have the reputation to harm.

10 Q But if people came to my house and saw this, saw it
11 mutilated or the integrity of it is compromised, that could be
12 actionable under this statute?

13 A Correct.

14 Q Go ahead.

15 A And, then, the third right is the right to prevent the
16 destruction of work, but that is the highest bar.

17 Q That's the higher bar? Has to be recognized stature?

18 A Correct.

19 Q So all the other things deal with the artistic integrity
20 and reputation, whether it's a work of recognized stature or
21 not, but now when we come to destroying it, which is what
22 we're talking about here, it has to be one of recognized
23 stature.

24 A Because the drafters recognize that something exactly
25 like this case could happen, where --

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1 Q This is the case. Any other cases like this?

2 A Yes, there have been a small number of cases under which
3 the recognized stature has been discuss the for VARA.

4 Q Tell me about it. I want to make sure my law clerk has
5 found them all.

6 A I'm very sure that he has. And, really, he only needs to
7 look at one, because they're both influential. It's
8 *Carter versus Helmsley-Spear, Inc.*

9 Q Southern District?

10 A Correct. And in that case, the court found that the
11 recognized stature provision was a, quote unquote,
12 "gatekeeping measure" for the avoidance of nuisance suits.

13 Q So we're doing the right thing here by having this
14 gatekeeping hearing?

15 A Correct. And the court in that case also said, again,
16 that Congress had -- that the decision maker should consult
17 experts to find out the opinion of the art experts and a cross
18 section of society as a whole.

19 Q Right. So you're being put forward as an expert in
20 this -- I got to pronounce the name correctly. Ms. Chanes --
21 to see whether or not you really are a qualified expert to
22 opine about these things. But in the meantime, we know your
23 academic background. Is there anything else you want to tell
24 me about your so-called expertise? I don't want to cut you
25 short.

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1 A Just to clarify that my special area is the use of legal
2 regimes (sic) to prevent the destruction of works of art that
3 are deserving of preservation.

4 Q I want to get back to what's something of recognized
5 stature? You're telling me that we have this legislative
6 history and then the *Carter* case; right?

7 A Yes.

8 Q What comes down the pipeline here?

9 A So both legislative history, and the plain text of the
10 statute, and the case law suggests that you have to look for
11 recognition of the particular work that -- for which
12 protection is being claimed.

13 Q You focus on the work?

14 A Not the genre, not the artist, but that particular work.

15 Q The artist is irrelevant here?

16 A Not every work created by an artist is in dispute (sic)
17 with plaintiff's expert. Not every work created by an artist
18 is deserving of recognition under VARA.

19 Q So we talked about Picasso putting a dot on the canvas
20 and Rembrandt. So by itself intrinsically that doesn't have
21 any particular value, but the fact that it's associated with
22 Picasso would or would not make it a work of recognized
23 stature under the statutory embrace?

24 A Being made by Picasso isn't sufficient to show recognized
25 stature, or else banks couldn't stamp his checks cancelled

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1 after he signed them, or else a restaurant would have to
2 preserve the tablecloth after he dribbled barbecue sauce on
3 it.

4 Q The artist doesn't make a difference?

5 A One of many factors.

6 Q Who the artist is is a factor that the Court should
7 consider?

8 A Correct. But more important to me is the recognition of
9 that work. So, for example, in preparing to testify here, I
10 looked for any scholarly or popular mentions of these 24
11 enumerated works of art. I looked in dissertations, in books,
12 in journal articles.

13 Q So recognition, you're taking a literal view of that
14 word; has to be recognized by somebody other than the being on
15 this wall?

16 A Yes. I decided to start with the very lowest level of
17 what recognition could mean. And I found that for 19 of the
18 24 works of art, there were no dissertations, no journal
19 articles, no other scholarly mentions of the workman book.
20 And for 19 of these 24 works, if I Googled the name of the
21 work and the name of the artist, there were no Google results.
22 No one at all had seen fit to put on the Internet the name of
23 that work.

24 Q They talk about these websites. I heard something about
25 that.

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1 A There are many websites that mention 5Pointz as a site.
2 There are some websites that have, sort of incidentally,
3 images, pictures of these works of art. But no one has, for
4 19 of these works, recognized at all them under their proper
5 titles.

6 Q How about the artists we heard about? The Too -- what's
7 her name again.

8 MS. CHANES: TooFly.

9 BY THE COURT:

10 Q I heard she's well known internationally. Mr. Cohen is
11 well known internationally. That's not the case?

12 A So I looked at the names of the artists for scholarly
13 recognition. With the exception of Lady Pink, none of these
14 artists had been mentioned in a dissertation, or a scholarly
15 book or a journal article.

16 Q But the general reputation throughout the world, I hear
17 testimony that they're known all over.

18 A I believe they're known within the subculture of aerosol
19 art fans, but that --

20 Q You recognize in that so-called well known subculture
21 they're well known people?

22 A I understand that this is what plaintiffs are claiming --

23 Q I'm just asking you. I'm not telling you what they're
24 claiming. I'm asking you the subculture. You have a
25 subculture where somebody's recognized within the subculture

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1 that is of some value?

2 A Yes, you can. But what I would like for is whether that
3 particular work by that person has been recognized within that
4 subculture, and I could not find that. So 10 of the 17
5 plaintiffs have their own website, and only three of the 24
6 works are mentioned even on their artists' own websites.

7 Q Now, you said that 19 out of 24, you could not find any
8 so-called recognition, as you just defined it. How about the
9 other 5?

10 A Three are mentioned by the artists themselves or on the
11 5Pointz website. And then two of the remaining works each
12 have one mention a piece on a street art website, on a blog or
13 an artist's blog.

14 Q That's what you found?

15 A Correct. So even under a sort of dictionary definition,
16 plain meaning of recognition, to have one mention at all on
17 the whole of Google seems to me --

18 Q You've expressed that, in terms of what's out there in
19 that physical world. But there's testimony, and I suppose you
20 agree, that lots of people come to see this 5Pointz, and they
21 look at these works. You don't question that, do you? I mean
22 busloads of children and these corporate people, just
23 thousands of people come to that site. It's become pretty
24 well known even though it may not be on any -- in any book or
25 scholarly treatise, you're not questioning that, are you?

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1 A No.

2 Q Is that a form of recognition?

3 A They're recognizing the site, they're not recognizing any
4 particular one work of art.

5 Q They would have to come to see a particular work of art?

6 A Correct.

7 Q If they did that, then that would be some form of
8 recognition?

9 A Correct.

10 Q So am I correct in understanding that recognition, you
11 know, is somewhat an expansive concept? You can have academic
12 recognition. You can have practical recognition by people
13 flocking to see something. Even if it's not in any book, it
14 would all be under the umbrella of this concept of
15 recognition; right?

16 A Correct.

17 Q How about the quality of the work, what if something's of
18 outstanding quality but it's not in any books or academic
19 studies?

20 A Well, quality is certainly one of the factors in the
21 stature of work of art, but I think it's not what the statute
22 is going for, because the stature is recognizing not
23 particular qualities of objects but the way these qualities
24 are valued by the public. So, for example, to use some of the
25 factors that the plaintiffs were talking about earlier, a

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1 Persian rug has outstanding technical qualities, and color,
2 and design but it is not -- I can burn a Persian rug. It's
3 not protected by the statute.

4 Q So now you know I gave a homework assignment to
5 Ms. Mastrion. I gave you the same homework assignment, to
6 look at what the court put in its gallery. I guess that's a
7 form of recognition, it's in the court gallery. Would that
8 qualify as recognition?

9 A Well, I took the liberty of taking one of the flyers that
10 are on the table there, which helps me do some analysis of
11 recognition, because, again, I'm just one person, my personal
12 opinion doesn't speak to it.

13 Q Certainly there's a public aspect to the artwork that's
14 in the gallery?

15 A The fact that the work is in a gallery chosen from a
16 number of artists, available to the public. This flyer says
17 that the artist is a professor or at Cooper Union and Pratt,
18 which speaks to judgment of his stature as an artist,
19 presumably, quality of his artwork. And the flyer quotes from
20 a New York Times article about the artist, which, again, is
21 one form of --

22 Q The fact that -- real actual recognition by newspapers
23 and academic credentials?

24 A And the table in the exhibit very helpfully had three or
25 four books and exhibit catalogs featuring the artist.

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1 Q So that would ring the bell?

2 A I'd have to do more work to see how many scholars, how
3 many newspaper articles, what the general consensus is.

4 Q Right. But, you know, it's recognition of a form, so if
5 you have that threshold recognition, which, I guess, is what
6 you're saying, even though you'd like to know more, would the
7 quality of the work make a difference?

8 A It's more the consensus of the scholarly community and
9 the art community on that work. So just to give your Honor an
10 example, comparative example, Banksy has had -- has been
11 mentioned in something like a hundred and thirty dissertations
12 and more than 1500 scholarly articles.

13 Q He's out there?

14 A Very much out there. A work that he revealed on
15 October 31st, a little over two weeks ago, I searched for the
16 title of that work and his name is there more than 400,000
17 Google hits.

18 Q That's recognition?

19 A That's recognition.

20 Q How about the stature part?

21 A There's a general consensus, I don't know among the
22 public, that his work is innovative and adds to the history of
23 art.

24 Q So you need the recognition and stature. Stature seems
25 to me embraces things that are innovative, whether it has

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1 artistic value, whatever that's all about. How would you then
2 assess whether a work is of stature? It may have not been
3 recognized yet, but it's of stature, in any event. Would have
4 to be both?

5 A It would have to be both.

6 Q You told me about recognition, an academic type of thing.
7 How about stature? How do we determine whether the work in
8 our gallery is a work of stature?

9 A Well, I noted your Honor is the owner of one of those
10 paintings, so if you want my art-appraisal services, I'm not
11 going to do it on defendant's dime.

12 Q I'm trying to get a handle. I use that because -- as a
13 logical thing. It's in the courthouse and, obviously, I have
14 an interest in all of that, so it's why I have you here. You
15 can use it if you choose to tell me how to go about deciding
16 whether the work we chose to put there is one of stature or
17 not?

18 A Well, I think that stature is much more difficult to
19 define than recognized.

20 Q But the statute tells me I have to do this; right? So
21 how do I do it?

22 A If something isn't recognized, then you don't have to --

23 Q It is recognized.

24 A If it is recognized, I think you can look at a critical
25 assessments of the work, so as an art historian --

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1 Q Would you be able -- I don't know if I can do it. I may
2 like it, but, you know, what do I know? How do we find out --
3 you know, I have to decide what something of stature is. How
4 do I do it? Go ahead.

5 A What usually makes things last in the history of art is
6 the way in which they change our idea of what --

7 Q Innovative. Is the work downstairs innovative? Does it
8 ring that bell? You don't think so. You can tell me. Don't
9 worry, you're not going to get thrown in jail.

10 A It doesn't ring the bell for me, because the forum of the
11 of political murals has had its heyday in the 1930s and 40s.
12 Some of the literature mentioned that this artist is
13 influenced by a student of Diego Rivera, who would be a very
14 hard bar to pass in terms of evolving the art form.

15 Q Anything else? How about what -- other factors do I
16 consider in deciding whether it is of stature? Innovation,
17 you mentioned.

18 A Changing the history of art, so uniqueness. So, for
19 example, it's very much more difficult to achieve stature
20 using an art form or art style that has been around for a
21 couple of decades, rather than --

22 Q I've haven't seen a lot of things quite like that. I
23 mean, I don't know what you're talking about.

24 A I'm big fan of New York graffiti during the 1980s.

25 Q You're what?

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1 A A fan of graffiti art of the 1980s.

2 Q You are?

3 A I am. The so-called "Wild Style," if your Honor hasn't
4 watched the movie, I recommend it.

5 Q What's the movie? Who is in the movie?

6 A Selection of New York graffiti artists, including Lady
7 Pink, who is one of the plaintiffs --

8 Q She's in there too?

9 A She is, because in the 1980s her work was innovative, was
10 creative, but not -- that doesn't mean that everything she
11 does for the entire rest of her life has that same impact.

12 Q You seem to be presenting a very strict type of standard;
13 it has to be breakthrough, something that hasn't been done
14 before. Is that what you're trying to tell me?

15 A Because I believe that's what the legislative intent is
16 it's not a balancing provision if one --

17 Q Where do I find that in the legislative history it has to
18 be this exceptional kind of thing that you describe?

19 A You can provide your chambers with --

20 Q No, you can tell me.

21 A I believe there's records on discussion, discussions in
22 Congress, and you can look at the difference between the
23 drafts of the act.

24 Q It has to be something really wow, really way out there,
25 really different?

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1 A Something of value to the public.

2 Q We may be talking in circles now?

3 A I'm an academic; I can't help but do that.

4 THE COURT: All right. You want to ask any further
5 questions, Mr. Ebert? She's giving you the benefit of her
6 knowledge.

7 Q (BY MR. EBERT) Just to be clear, you formed an opinion
8 whether any of these 24 works have achieved recognized
9 stature?

10 A I have formed an opinion. I don't believe any of them
11 are recognized stature.

12 Q And that's based on the elements that you describe to
13 your Honor, the research that you did, your knowledge of the
14 field?

15 A Correct. My failure to find any -- or only a miniscule
16 amount of public discussion.

17 Q Is there any street art or graffiti that you know that
18 has achieved recognized stature?

19 A There is. So as I was explaining to your Honor, Banksy,
20 Keith Haring, Basquiat, all of whom have been the subject of
21 numeral dissertation, scholarly attention, public love, public
22 recognition.

23 Q But are those -- are there individual works that you can
24 identify?

25 THE COURT: The Banksy, is that something that is

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1 really innovative or is it just recognized because it's out
2 there?

3 THE WITNESS: It is innovative. For example, during
4 his residency in New York and this past month, he was --
5 balloons in the shape of graffiti letters. He combined live
6 performance and sculpture. And not to mention the messages of
7 his work are generally wittier, more incisive than prior
8 artists.

9 THE COURT: How about these light bulbs, these
10 people's faces on light bulbs, I've never seen anything quite
11 like that before; would you say that's innovative?

12 THE WITNESS: I believe that light bulbs have been
13 used in cartoons as the idea symbols since the 1920s, so, to
14 me, to put a face on them isn't that much of a stretch.

15 THE COURT: Anything else you want to ask?

16 MR. EBERT: Yes.

17 Q (BY MR. EBERT) Are you aware of the works at times --
18 works at 5Pointz are painted over, new images are put up and
19 they're painted over?

20 A Yes.

21 Q Does that affect your opinion whether these works have
22 achieved recognized stature?

23 A Something can be ephemeral and achieve recognized
24 stature, but the ephemeral nature of the painting affects my
25 opinion of what preservation of what that means.

1 BY THE COURT:

2 Q Give me an example of something ephemeral but has
3 achieved recognized stature?

4 A So, really, any work of art that's painted on an outdoor
5 surface is vulnerable to changes of weather, of aging. Keith
6 Haring painted over his career thousands of works in public
7 places. As far as I'm aware, only two of them remain in their
8 original locations, and one of them is currently being
9 restored in Philadelphia, which means, essentially, repainting
10 it.

11 Q In any event, recognized stature has to be something
12 that's permanent. Could be something that's ephemeral, as you
13 say, as long as it otherwise qualifies as something that's
14 recognized of stature?

15 A Yes, I mean, there have been works that have been
16 destroyed that are still recognized, but it speaks to me
17 more --

18 Q It's a factor?

19 A It's a factor.

20 Q Any other factors out there that I should think about?
21 You talk about the innovation factor, this risk factor;
22 whether it's ephemeral or not is a factor. I guess the
23 artist, the recognition of the artist is a factor; right?

24 A You can look, as *Carter* suggested, at the opinions of a
25 cross section of society. If there's love out there, name

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1 recognition, appreciation by a broad array of people, as
2 opposed to just a subculture that speaks --

3 Q What do you mean by a broad array of people? Thousands
4 of people have come to see the works at 5Pointz. That's a
5 pretty broad array, isn't it?

6 A Not considering the population of New York, the art-going
7 public. The Metropolitan Museum of Art has something like 16
8 million visitors a year, so a couple of thousand is not --

9 Q So our gallery downstairs is never going to make it;
10 right?

11 A So you could look also at valuation on the art market.

12 Q Monetary aspects?

13 A Banksy's works of art are worth hundreds of thousands of
14 dollars.

15 Q So is that a factor, also, the economic or the value --
16 economic value of the painting?

17 A I think that's a factor that allows you to get at
18 recognition of stature.

19 Q Anything else out there? I'm just giving you the
20 opportunity to tell me what the factors are, what you think
21 should be considered. The *Carter* case has been followed by a
22 few other courts; right?

23 A Uh-huh. I think I've given your Honor enough of --

24 Q What?

25 A I think I've given you enough of my ideas.

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1 THE COURT: Just giving you the opportunity.
2 Anything else?

3 Q (BY MR. EBERT) Have you observed any of the actual works
4 of 5Pointz?

5 A Yes, I visited earlier this week.

6 Q Have you observed the condition of the works on the
7 building?

8 A Yes, so the -- many of the works, I'm -- not those named
9 in the complaint, but many of the other works have sustained
10 some level of damage. They have paint flaking off from things
11 banging against them or from paint bubbling away from
12 underlying paint layers. So, in my opinion, these objects,
13 even if defendants don't do anything to the building, are not
14 going to be around for more than a couple of years.

15 THE COURT: Anything else?

16 MR. EBERT: Your Honor, just from Ms. Thompson's
17 professional purposes, I move to qualify her as an expert. I
18 don't know if that's implied, that she's been qualified, but I
19 ask that she be qualified as an expert in art history and
20 contemporary art.

21 THE COURT: Whatever. We're here.
22 Cross-examination. Do you have any other questions?

23 MR. EBERT: No. Thank you, your Honor.

24 THE COURT: Go ahead.
25

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CROSS-EXAMINATION

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BY MS. CHANES:

Q Good afternoon, Ms. Thompson. Do you have a CV?

A Not with me, but you can find most of my CV on the John Jay website.

Q Do you have a CV other than a listing of your resume on the website that you distributed?

A Yes.

Q And did you provide that to defendants in this action?

A I believe I may have in the past.

Q Ms. Thompson, you said you never testified in court before; is that correct?

A Correct.

Q And you said -- and so you've never been designated as an expert by any court; correct?

A Correct.

Q What do you consider your primary area of expertise?

A The history of art.

Q Do you have any expertise in the area of street art or aerosol art?

A Insofar as it's part of the recognized movements in the history of art, but contemporary aerosol art is not my strong suit.

Q So you know more about historical stuff from the 70s and 80s but not current stuff?

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1 A Correct.

2 Q So you're not here testifying as an expert on street art,
3 aerosol art; correct?

4 A I'm testifying on what it means to be a recognized work
5 of art for which a broader perspective and the whole work of
6 history of art is more valuable than a particular expertise in
7 one area.

8 Q So you're not testifying as an expert in street art or
9 the aerosol art; correct?

10 MR. EBERT: Objection, your Honor. She answered the
11 question.

12 MS. CHANES: I was looking for a yes or no.

13 THE COURT: Objection overruled.

14 You may answer that question.

15 THE WITNESS: I am not testifying as an expert in
16 this particular genre.

17 Q (BY MS. CHANES) Do you have any expertise with respect
18 to any of the Hip Hop arts movements?

19 A No.

20 Q So you're not testifying as a member of the Hip Hop Arts
21 Movement; correct?

22 A No.

23 Q And I believe --

24 THE COURT: There is such a movement; do you
25 recognize that?

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1 THE WITNESS: Yes.

2 THE COURT: It's pretty profound. It's really very
3 much part of our culture, isn't it? Or you ignore it
4 completely? It may not be your bag?

5 THE WITNESS: It's not my bag, but I'm aware of --

6 THE COURT: Just aware. It seems to be a pretty
7 significant part of our culture. Hip Hop musicians all over
8 the place.

9 THE WITNESS: Many things are part of our culture
10 today.

11 Q (BY MS. CHANES) Are you aware that the Hip Hop Arts
12 Movement is the fastest growing art movement in the country at
13 this point?

14 A How are you defining it?

15 Q I would say fastest growing by -- growing by revenue,
16 generated across the scope of Hip Hop aerosol art, DJ-ing,
17 break dancing.

18 THE COURT: There's literature about that. You
19 know, people write about Hip Hop, and all these things, all
20 the time, don't they?

21 THE WITNESS: Yeah, I'm not seeing a connection
22 between the music and the visual arts aspect for this.

23 THE COURT: I mean --

24 THE WITNESS: To call something the fastest growing
25 but to attribute -- most of that has to be attributed to music

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1 rather than the visual arts --

2 Q (BY MS. CHANES) I actually didn't say that. I was
3 referring to the movement as a whole. I didn't say that most
4 of the revenue is coming from the music.

5 A No, I'm assuming that.

6 Q Okay. So --

7 THE COURT: You know, in your world, don't you want
8 to know about what the Hip Hop Movement is and how that
9 interfaces with what's happening in the creative world today?
10 You don't care about that?

11 THE WITNESS: Well, my contemporary artist friends
12 and interests take different aspects of the contemporary
13 artwork.

14 THE COURT: Doesn't sound like you know a heck of a
15 lot about Hip Hop art, or about aerosol art or about any of
16 these movements right now at all. It's not your thing?

17 THE WITNESS: Not in that contemporary form.

18 THE COURT: You refer to them as subculture.

19 Q (BY MS. CHANES) I believe you testified you did
20 independent research on 5Pointz?

21 A I visited the site and conducted research online.

22 Q Did you read any books about 5Pointz?

23 A I'm not aware that there are any books solely about
24 5Pointz. I looked at 5Points' mention in other books.

25 Q Could you give us an example of a few of the books you

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1 read?

2 A I haven't read the whole books, I looked at the excerpts
3 that mentioned 5Pointz.

4 Q Could you give us an example of those books?

5 THE COURT: I guess she's asking you what books did
6 you read that refer to 5Pointz or discussed it.

7 THE WITNESS: I can't --

8 Q (BY MS. CHANES) Or -- to make it easier, or the artists,
9 the particular artists of the particular works of art at issue
10 here?

11 A So I could not find any references to the particular
12 works of art at issue here, nor to most of the artists. I
13 can't remember the titles. I apologize.

14 Q About how many books did you read?

15 A I found 5Pointz mentioned in something -- records
16 indicating that it was mentioned in something like ten books,
17 so I looked at the excerpts from them, but it was mainly
18 thanking graffiti artists for letting the author observe.

19 Q Was that online research, or did you go to a book store
20 and look at the street art section in the book store?

21 A I did not go to a book store. I looked at the Columbia
22 University library system catalog, which electronically
23 indexes excerpts from books.

24 Q And how large is the Columbia University library? I'm
25 not asking you to be an expert; I seriously don't know.

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1 A It's the -- America's premier selection in art history
2 text.

3 Q Art history but not contemporary art; is that what you're
4 saying?

5 A No, art history includes contemporary art.

6 Q You said you visited 5Pointz once in connection with your
7 appearance here?

8 A Correct.

9 Q And how long were you there?

10 A About an hour.

11 Q You mentioned, when you were talking about your areas of
12 expertise, that you really focus on art crime; is that
13 correct?

14 A Correct.

15 Q But there's no crime at issue here; correct?

16 A I think plaintiffs would allege that if art was
17 destroyed, that was a criminal act. But art crime in the way
18 I look at it includes the unlawful destruction of art.

19 Q So your testimony here really doesn't have to do with any
20 of these artworks being crimes; correct?

21 MR. EBERT: Being what?

22 Q (BY MS. CHANES) Being done illegal? Sorry.

23 A Correct. There's no dispute, as far as I'm aware of
24 that.

25 Q When you were talking about your expertise -- or,

1 actually, strike that. When you were talking about the
2 recently discovered works of Nazi-looted art that Judge Block
3 mentioned, and you, I believe, mentioned that the Nazis banned
4 that art because it was considered to be degenerate modern art
5 that they wanted to get rid of; is that correct?

6 A Correct.

7 Q Is that a frequent theme you have seen throughout art
8 history as new art movements come along, where the new art
9 movement -- for instance, like the Fobes (phonetic) is
10 referred to as degenerate or even cubism, degenerate modern
11 art that is going to lead to the downfall of society? You can
12 have some more water, if that would make your life easier.

13 A If I'm still here in the afternoon, I'll have to bring
14 some Purell.

15 Actually, the Nazis are often paradoxically
16 accredited with making rhetoric about degenerate art no longer
17 being acceptable, so some people say the uprise of abstract
18 expressionists art was helped along by people not willing to
19 be seen as fascists in their disapproval of it, but there's
20 certainly many art movements, from impressionism, really, from
21 the 1880s on --

22 THE COURT: We don't have to get into all of that.

23 Q (BY MS. CHANES) Also, in your testimony, you referred to
24 the 60s, 70s and 80s being sort of the heyday of street art
25 and that's it's essentially been all downhill from there; is

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1 that correct?

2 A Correct, in the heyday, not all downhill, but less
3 interesting to the ongoing history of art.

4 Q Are you aware of the fact that Sotheby's and the Doyle
5 Gallery, etcetera, are having record-breaking street art
6 auctions now?

7 A And is that of art created now or of art such as Basquiat
8 or Haring that was created earlier and being sold now?

9 Q It is including art that's being created now, including
10 contemporaries of this one, Carlos Game and Luis Lamboy, I
11 believe.

12 A I believe if you look at the prices brought by 80's
13 street artists, they are millions of dollars higher than
14 contemporary street artists. They'll have to wait, perhaps, a
15 couple of decades.

16 THE COURT: Should I wait a couple decades before I
17 render my decision here?

18 MS. CHANES: Yes.

19 THE WITNESS: I have no opinion to that, your Honor.

20 MS. CHANES: You're a lifetime appointee, but don't
21 push it.

22 Q (BY MS. CHANES) You had also testified that street art
23 is meant to be ephemeral; is that true?

24 A As a generally recognized characteristic of the genre,
25 yes.

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1 Q And when you mean -- strike that. And by that you mean
2 illegally painted street art; is that correct?

3 A No, the work of street art could be legal, so Banksy
4 sometimes receives permission from building owners, but makes
5 street art such as out of balloons that can't survive for more
6 than a couple of days.

7 Q But isn't Banksy's balloon piece kind of unique?

8 A There are other street artists who render works in
9 posters (phonetic), or in stickers, sticker art, yarn,
10 bombings. Many street artworks are rendered in media that
11 can't survive for more than a couple of weeks.

12 Q So your opinion that street art is meant to be ephemeral
13 is based on how the piece is painted, whether it's yarn, or
14 paper, or balloons or something like that, so if it's painted
15 with permanent paint -- I'm sorry. Is that correct?

16 A No, that's one factor. But, for instance, the
17 competitive nature of street art also influences my belief
18 that it is recognized to be ephemeral. In street art there's
19 a limited amount of public space in which artwork can be
20 placed, so if an artist is painting over other artworks or
21 artists' works in order to create their own work of art, they
22 have to recognize the work of art they make is subject to
23 being painted over in turn.

24 Q Why? I mean, I honestly don't understand. Why do -- if
25 it's a legal wall and they paint on it, why do they have to

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1 recognize that it's going to be painted over by somebody else?

2 A It's about the general history of street art. There
3 might be particular situations in which an artist believes
4 that he or she is being commissioned to make a work that will
5 last for a long time.

6 Q So when you said that the street artists expect their
7 work to be ephemeral, do you have any person knowledge from
8 discussions or interviews you've read with artists that that's
9 what they want?

10 A In -- I read the exhibits attached to the complaint, in
11 which several of the plaintiffs discussed how they know that
12 their work is going to be painted over or demolished.

13 Q Although I believe, in most cases, those plaintiffs were
14 testifying regarding illegal work and not work that had been
15 done with the artists' permission?

16 A So as far as I understand, 5Pointz is meant to be a
17 microcosm of general street art, so the qualities that
18 characterize illegal street art, I don't see are supposed to
19 be changing that much for the illegal street art here.

20 Q Some of it would be intended to be permanent and some
21 would be intended to be ephemeral just like traditional street
22 art?

23 A From what I understand of how the system at 5Pointz
24 works.

25 Q I'm sorry. That's not the question I asked. I asked --

1 you said the 5Pointz was a microcosm of the street art
2 movement, and so I'm asking, as a microcosm of the street art
3 movement, since some works are intended to be permanent and
4 some works are intended to be, you know, just last for a day,
5 does 5Pointz then -- wouldn't 5Pointz then qualify as having
6 some permanent works and some temporary works?

7 A I see that I haven't been clear enough, so I believe that
8 in the street art world in general, outside of 5Pointz, those
9 works are understood as ephemeral, so 5Pointz is different in
10 its nature if some of those works are intended to be
11 permanent. Although, based on the material and the exposure
12 to the weather, the other activities there, I don't see how
13 anyone could reasonably believe they are going to last
14 forever. Not even Leonardo da Vinci can survive undamaged.

15 Q Isn't it true, then, that any work of art eventually is
16 going to deteriorate, whether it's Leonardo da Vinci, or a
17 statue, or the works at 5Pointz or Banksy's works?

18 A When the sun fails, eventually works of art will go away,
19 but an artist can choose to make and protect their work of art
20 in a way that will ensure that it will last longer.

21 Q But an artist cannot protect their work of art after they
22 no longer own it; is that correct?

23 A Incorrect, because that's what VARA allows them to do.

24 Q But they can't protect it from the elements after they no
25 longer own it?

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1 A Incorrect, I believe you can protest someone keeping your
2 work of art -- someone putting your painting in their garden,
3 if that's going to mutilate it, under the statute.

4 Q I think the statute says ordinary wear and tear, and the
5 elements of natural deterioration aren't covered by VARA.

6 A That's correct, but putting a water color in your
7 garden --

8 THE COURT: Exposing it to obvious harm wouldn't be
9 protected?

10 THE WITNESS: Correct.

11 Q (BY MS. CHANES) Just to circle back, when you said that
12 street art is meant to be ephemeral, you have no personal
13 knowledge of that fact; is that correct?

14 A No, I'm not a graffiti artist, but from everything that I
15 have read about history of street art and plaintiffs' own
16 activities, that is what I understand.

17 Q So the answer to that question is, no, you have no
18 personal knowledge?

19 A No personal knowledge.

20 Q Thank you. You had mentioned the *Carter* case and talking
21 about the gatekeeping -- *Carter* being *Helmsley-Spear*, the
22 Southern District, and you mentioned that the test established
23 by the Southern District for determining recognized stature
24 recognized three different ways to determine recognized
25 stature. One, it was through the testimony of art experts,

1 which you discussed, and also the testimony of a cross section
2 of society, which you also discussed; but the third criteria
3 established by the Southern District was that members of the
4 art movement itself can be -- their testimony can be
5 dispositive as to the recognized stature repeats; is that
6 correct?

7 A No. *Carter* mentions the art community as the dispositive
8 factor, not the particular movement in question, so you would
9 look at -- you could ask a section of all practicing artists,
10 art collectors. The art market is a good way of getting at
11 this idea of the art community.

12 Q Would the art community have to be the entire art
13 community throughout the world or could it not be, for
14 instance, the Hip Hop Movement?

15 A No, because self-recognitions are not, I think, what VARA
16 is looking for. VARA is looking for value to the public, so
17 you would have to achieve some consensus among some portion of
18 the community.

19 Q But aren't members of the Hip Hop Movement members of the
20 public?

21 A Correct.

22 Q And aren't there -- I don't know, but I understand that
23 there are millions of fans of Hip Hop, the whole movement in
24 this country. And I'm not asking you to testify to that,
25 because I don't know the answer and you don't know the answer.

1 But if there are millions of people in that movement that
2 recognize that -- you know, the validity of the stature of
3 these works of art, wouldn't that be sufficient under VARA?

4 A If they had recognized the validity of these particular
5 works, perhaps, but my searching found nary a mention of 19 of
6 the 24 works, even by these potential millions of Hip Hop
7 fans.

8 Q Is there anything in VARA that requires that the work at
9 issue be mentioned by a particular name in a particular
10 publication?

11 A VARA doesn't define the term.

12 Q So just the fact that you can't find anything when you
13 Googled those names doesn't mean that they're not a recognized
14 stature; correct?

15 A I disagree, because under the dictionary definition of
16 recognized, someone has to be doing the recognition. So if
17 you get zero Google results, that doesn't seem like
18 recognition to me.

19 Q Is Google the only source for determining recognition of
20 a work of art?

21 A No, but it allows one to search other sources.

22 Q But if Google isn't dispositive as to whether or not
23 something is recognized, then your testimony that you Googled
24 these particular names and didn't find them fails, doesn't it?

25 MR. EBERT: Objection, your Honor.

1 THE COURT: Sustained. It's argumentative. Go
2 ahead.

3 Q (BY MS. CHANES) I'm just trying to understand. On the
4 one hand, Ms. Thompson talked about -- talks about people
5 recognizing artwork, and she said the lowest level of what
6 recognition could mean under *Carter*, Wallace and VARA was that
7 recognition by the experts, but I actually think that the
8 lowest level of -- excuse me. Isn't the lowest -- question:
9 Isn't the lowest level of recognition actually some cross
10 section of society or members of the arts community?

11 A I think the lowest level that you could possibly
12 interpret VARA is just the dictionary definition of
13 "recognize." Google isn't perfect, but it is certainly the
14 best way we currently have of understanding anyone's
15 understanding, awareness, appreciation of anything in
16 particular. But if you define the recognized stature
17 provision alone, it becomes meaningless. Any level of
18 recognition serves to satisfy it.

19 BY THE COURT:

20 Q I think what you're saying is the art community could
21 embrace the street artists, performance artists. I mean you
22 call them subculture. Subculture could be a significant part
23 of the overall culture. I don't think Thomas (sic) is talking
24 about everybody in the United States, when they're talking
25 about the art community. It embraces all different aspects of

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1 it; right?

2 A Correct, but I think they would be talking about all
3 artists.

4 Q I think you also said aerosol art can be part -- could be
5 recognized. You mentioned Banksy. But when talking about
6 these particular works, specifically, have not been
7 recognized. They're not of stature. I'm not so sure I
8 understand the difference between recognition and stature yet.
9 You seem to be co-mingling them to me. Stature seems to be
10 something that deals with the quality of the work.
11 Recognition seems to be something to say whether or not that
12 particular work, given its quality, you know, is something
13 that people know about. I'm a little confused about that.
14 They're two different things here; right?

15 A I think --

16 Q Seems to me that stature deals with a qualitative
17 concept, maybe recognition with a quantitative concept; does
18 that sound right?

19 A That sounds reasonable to me.

20 Q The work can be of high quality by artists, even if it's
21 not, you know, recognized, so to speak, by law, respectfully
22 population, large population; correct?

23 A That's correct.

24 Q So when you looked downstairs, you can say that's a work
25 of quality, even though they may not be recognized by a large

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1 segment of the public? How would you define it?

2 A Again, you're trying to get me to evaluate --

3 Q Yeah, because you said it has to be a breakthrough type
4 of thing, and I have testimony here that says it's not so. I
5 look at some of these works here in these pictures, and they
6 seem to be pretty high quality to me. The degree of
7 difficulty, colors, all these things have been mentioned by
8 people whom testified, and you say that doesn't mean a row of
9 beans. I don't think you really mean that. I mean a line
10 drawn is one thing, but these -- Banksy, that seems to be a
11 complex work of color and design; isn't that something of
12 stature?

13 A But again --

14 Q You just discount all of that completely?

15 A No, I don't think that that's what the statute is going
16 for, because like the Persian rug I brought up before, things
17 can be very high in quality without being a work of visual art
18 that is important to the history of visual art. It's
19 important to the public --

20 Q So you seem to place a very high burden here, a very high
21 standard on what could be considered recognized stature?

22 A I do.

23 Q Has to be a da Vinci, or a Picasso or something like
24 that; is that what you're saying?

25 A Banksy has certainly recognized stature.

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1 Q He's an example of someone's who is an aerosol artist;
2 right?

3 A (Inaudible response)

4 Q And he's part of the subculture, I guess, isn't he?

5 A Yes, but he's also achieved broader recognition. If my
6 mother knows who Banksy is, he's a recognized artist.

7 Q So your mother should be the standard; right?

8 A You can call her up. I'll give you her number.

9 Q It's hard to get your hands around it, isn't it?

10 A It's true.

11 THE COURT: Anything else?

12 Q (BY MS. CHANES) Going back to *Carter v. Helmsley-Spear*,
13 you've read the drafting history too, maybe you can help me
14 out here. In either the *Carter* case or the drafting
15 history -- and I cannot remember this -- there was a quote
16 about the reason they put in the recognized stature -- that
17 Congress put in the recognized stature requirement, and it was
18 essentially a gatekeeping mechanism to keep out nuisance
19 lawsuits, and the example given was like your kid's finger
20 painting. I can't remember where I read that. Do you recall
21 seeing that in the drafting history or the case law?

22 A I recall seeing the phrase "gatekeeping mechanism" in the
23 *Carter* lawsuit, but that might have been in the legislative
24 history as well. But the *Carter* lawsuit does discuss that and
25 the education of nuisance lawsuit.

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1 Q And one of the reasons that the gatekeeping mechanism was
2 added was to prevent judges from having to sit and serve as
3 art critics; is that correct?

4 A Correct. There would be a battle of the experts instead.

5 Q You had mentioned that -- people come to 5Pointz,
6 thousands of people that come every month, that they're coming
7 to just see 5Pointz -- in recognition of 5Pointz and not in
8 recognizing any particular piece or to see any particular
9 piece; is that correct?

10 A Insofar as research shows.

11 BY THE COURT:

12 Q That's why people come to museums too?

13 A Correct.

14 Q When they go to the museums, they may see a particular
15 painting that draws their attention. They're coming into the
16 museum.

17 A I think that cuts both ways. That means that not all
18 works of art even in the museum potentially are recognized.
19 And also I disagree; I think many people go to see the Mona
20 Lisa or Starry Night.

21 Q So you think Congress intended the statute to be limited
22 to works like the Mona Lisa and Starry Night?

23 A No, that's a very high standards. That why I --

24 Q I would have to deal with the gatekeeping standard. That
25 seems to be -- not a gatekeeping standard, that seems to be

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1 more than a gatekeeping, it seems to be a tomb, so to speak.

2 A I don't think it has to be that high, but there has to be
3 some sort of gate to keep. You can't allow any work --

4 Q But I'm dealing with a situation where we have testimony
5 that thousands of people have come; these people are well
6 known in that subculture world, and people who have testified
7 under oath. You don't take issue with that either?

8 A No, but I haven't read any testimony of the recognition
9 of these --

10 Q May not have that academic recognition. May not be the
11 type of recognition that you're trained to really opine about.
12 Could be a different type of recognition. We have a world
13 that's in motion here. Things happen. Things change, forms
14 of recognition. I don't know if it's academic, necessarily.
15 You're not saying it's academic?

16 A I wasn't only looking at academic recognition.

17 Q Thousands of people come from all over the world to look
18 at 5Pointz. I've had testimony to that.

19 A And not a single one of them has written anything about
20 what these --

21 Q That's the standard?

22 A That's the definition of recognition.

23 Q Whether it's been written about?

24 A No, I'm thinking about the dictionary definition of
25 recognition.

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1 Q Dictionary --

2 A I have seen no evidence that anyone has recognized these
3 particular works of art by title.

4 THE COURT: Well, that's what your standard is.
5 We'll see. Go ahead?

6 Q (BY MS. CHANES) Just to sort of finish off where I was,
7 when you said that no one comes to 5Pointz just to see a
8 particular piece, do you know that for a fact?

9 A No, I'm just deducing that from their failure to mention
10 any particular pieces.

11 THE COURT: It's all based upon what's in the
12 Columbia library; right?

13 THE WITNESS: Isn't life itself? And the Internet
14 as a whole. Those are my sources, Columbia and the Internet.

15 Q (BY MS. CHANES) Levity aside, so you don't know that
16 people don't go to 5Points to --

17 THE COURT: She's already testified. Good ahead.

18 Q (BY MS. CHANES) When you spoke briefly about the court's
19 collection of artwork downstairs, which is becoming famous,
20 you had mentioned that there were flyers that were circulated,
21 available in connection with that exhibit; is that correct?

22 A Correct.

23 Q And you mentioned some of the quotes in those flyers;
24 correct?

25 A Correct.

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1 Q And were those quotes about the artworks that are up
2 downstairs?

3 A It's a quote from the Times. I can't tell if the
4 article's discussing just the artists or any of the particular
5 artworks.

6 Q So as far as you know, the quotes could be just about the
7 artists and not about the artworks?

8 A Correct.

9 Q Would that change your opinion about the stature of the
10 work and based on what the Times is talking about?

11 A As I said, I'm not able to come to a decision about the
12 stature of the artist based on these factors.

13 THE COURT: But the stature of the artist is a
14 relevant factor, I guess; right?

15 THE WITNESS: Correct.

16 THE COURT: Then you have to look at the particular
17 work that's associated with that particular artist; right?

18 THE WITNESS: Correct.

19 THE COURT: So then that particular work is one that
20 is recognized stature?

21 THE WITNESS: Correct.

22 Q (BY MS. CHANES) Okay. You had also testified -- and I'm
23 almost done -- that the thing that -- what makes a work of art
24 last is that it's innovative; is that correct?

25 A That is one of the potential factors.

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1 Q All right. And you said that VARA was designed
2 specifically to cover these unique innovative pieces; correct?

3 THE COURT: It's being repetitious. She's already
4 testified. Anything else?

5 MS. CHANES: You also testified -- this is slightly
6 repetitious, your Honor.

7 Q (BY MS. CHANES) But you testified public love and public
8 recognition is a criteria for recognized stature under VARA;
9 is that correct?

10 A It could be a factor if the --

11 Q I didn't say the dispositive factor, I said that's one of
12 the criteria for recognized stature recognition; correct?

13 A It could be.

14 Q Okay. Is Banksy's stencil art innovative?

15 THE COURT: Is what?

16 Q (BY MS. CHANES) Banksy's stencil art innovative?

17 A He's certainly not the first to use stencils, but I
18 believe he's among the first to use them, and as large a scale
19 and with his innovative message he has.

20 Q So it's the messages about what he's doing, contained in
21 what he's doing, not the actual works himself?

22 MR. EBERT: Objection.

23 MS. CHANES: I'm just trying to understand.

24 THE COURT: No. No, you can explain that. You use
25 Banksy as an example. That's a subculture and qualifies as

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1 recognized stature; you've testified about that. His works.
2 Some of his works, I guess; right? All of his works?

3 THE WITNESS: No, some of his works have achieved
4 enough recognition.

5 THE COURT: Specific work?

6 THE WITNESS: Yes.

7 THE COURT: Go ahead.

8 Q (BY MS. CHANES) And you had also -- you were
9 specifically asked, I think by the judge, about the -- Meres
10 One's cartoon faces, the light bulbs with the faces on them?

11 A Correct.

12 Q You said light bulbs have been around as ideas in
13 cartoons since 20s, and you didn't think it was particularly
14 innovative to turn them into cartoon characters; correct?

15 A Correct.

16 Q Similarly, creating a cartoon character out of a mouse,
17 such as Mickey Mouse, is not particularly innovative; correct?

18 A Unless he's the first --

19 THE COURT: Let me ask you this, do you have any
20 more questions, because I have to use the facilities. We can
21 take a break now.

22 MS. CHANES: I can talk really fast.

23 THE COURT: Go.

24 Q (BY MS. CHANES) And you said unless it was the first
25 person to use --

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1 A To -- I believe Mickey Mouse was among the first animated
2 cartoons, if not the first, so the idea of animating
3 characters is innovative, but after Mickey Mouse, the idea of
4 adding eyes and talking to anything else, really, is not as
5 innovative.

6 THE COURT: I think we've covered it.

7 MS. CHANES: Nothing further.

8 THE COURT: We'll take a 15-minute break, and then
9 we'll have Mr. Wolkoff testify next.

10 MR. EBERT: Yes, your Honor.

11 THE COURT: All right. Fifteen minutes.

12 (Recess)

13 THE COURT: Mr. Wolkoff is testifying next?

14 MR. EBERT: He is.

15 THE COURT: Let me say for the record, Ms. Chanes,
16 when I said I was going to constitute Ms. Thompson as
17 the Court's expert, that's not really correct. And it's not
18 appropriate, because under the district rules, it has to be an
19 independent person, etcetera, etcetera; you have to have the
20 opportunity to chime in. But since there's no jury, and
21 whether you say she's qualified or not, I have to hear all the
22 testimony anyway.

23 MS. CHANES: I understand, your Honor.

24 THE COURT: So I was just trying to flush it out in
25 that context. So I think we've had an open discussion, and

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1 you can tell me, and I may or may not decide to give some
2 weight, limited weight, or whatever. But I had to hear it all
3 one way or the other.

4 MS. CHANES: I understand, your Honor.

5 THE COURT: It's different when you have a jury here
6 and you have to separate the parts, but regardless of whether
7 you make the application or not, I still have to hear the
8 testimony.

9 MS. CHANES: I understand, your Honor.

10 THE COURT: That's all we're trying to do. And I
11 think we had fair opportunity for everybody to flush out
12 whatever we were curious about. I mean, this is an
13 interesting area, obviously. And, obviously, the Court's
14 interested in the case, otherwise I wouldn't be doing this.
15 But we should be open and all -- have a positive view that
16 we're trying to get to the underbelly of something that is
17 kind of a not so well defined, and it's kind of an amorphous
18 area of what judges have to do. And we have many cases when
19 we have duelling experts. It's not unusual. In medical
20 cases, one says this, one says that, and the poor judge has to
21 scratch her chin and decide, well, what do you do for all this
22 stuff; right? This may be another one of those types of
23 cases.

24 We've had some different testimony already. I'm
25 anxious to hear from your final expert as to whether she

1 agrees or disagrees with Ms. Thompson. I'm anxious to hear
2 what she has to say, to what extent we have a very
3 conservative view of what Congress intended or more expansive
4 view, to what extent should it embrace subcultures. These are
5 interesting things, I think, in the art community, however you
6 define that. I'm just trying to grapple with that stuff.

7 MS. CHANES: And you thought you wouldn't get any
8 new and interesting cases this year.

9 THE COURT: Well, you know, there's one part of
10 this -- I'm sharing things. I'm very open, as you can tell,
11 in my thoughts, maybe sometimes to a fault. But I was
12 thinking initially about not burdening you all with a hearing,
13 but then the more I thought about this being a gatekeeping
14 issue and I thought about what gatekeeping means, we should
15 really see whether the gate should be opened and without
16 prejudging what would happen after that. I thought we would
17 go in this direction, and I think it's of some value to the
18 public that we're doing this. It's an open forum, and we're
19 getting information out, and people have the opportunity to
20 chime in on things that are with us in this world today. I
21 just wanted to say so you understand where I'm coming from.
22 You're entitled to know that.

23 MS. CHANES: Understood, your Honor.

24 THE COURT: Sometimes I could be wrong. Sometimes I
25 try to use comedic aspects to say things because I just can't

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1 resist the temptation, right, but it's all intended for
2 serious purpose. I just want you all to realize that.

3 MS. CHANES: Understood. And sometimes the comedic
4 remarks keep us awake.

5 THE COURT: This is part of the joy of our
6 profession.

7 Mr. Wolkoff, how are you?

8 THE WITNESS: Okay.

9 THE CLERK: Do you affirm the testimony you're about
10 to give to the Court will be the truth, the whole truth and
11 nothing but the whole truth?

12 THE WITNESS: Yes.

13 THE CLERK: Thank you. Please have a seat.

14 THE COURT: If you give me the opportunity to talk
15 to your client before --

16 MR. EBERT: How long do I have? How many questions?

17 THE COURT: You're not limited, but you know what I
18 want to find out. I want to find out what his understanding
19 was, how this all came about. I have a sense that he's a man
20 of good will, and he's trying to do good things, and does this
21 fall into the category of no good deed goes unpunished.
22 There's some sort of an understanding here -- he'll tell us
23 all about it right now.

24 THE CLERK: Mr. Wolkoff, could you state and spell
25 your name for the -- please.

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1 THE WITNESS: Jerry, Gerald, Wolkoff, W-o-l-k-o-f-f.

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. EBERT:

5 Q What's your work, Mr. Wolkoff?

6 A Real estate.

7 Q And what do you do in real estate?

8 A Generally develop.

9 Q And can you briefly describe types of properties that you
10 develop briefly?

11 A Yes, I have commercial properties, and I take -- most of
12 my life I've taken vacant land and put buildings on them.

13 Q In what areas of the city have you developed properties?

14 A Brooklyn, Queens, and then out on the island, in
15 Staten Island.

16 Q Very briefly, again, your work history? How did you get
17 to this point to be in real estate?

18 A Well, I started -- I started very young in business. I
19 went --

20 THE COURT: You mean you started when you were a
21 little younger?

22 THE WITNESS: A little younger. But I started to
23 work when I was 12 years old. I didn't have a father. Mother
24 was on home relief, so I went to work for somebody in the
25 Bronx. It was a politician by the name of Abe Stark. I went

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1 in and told Mr. Stark, "I need a job." I wanted to get out of
2 home relief, and he gave me a job.

3 THE COURT: He was the same one that had the sign
4 up?

5 THE WITNESS: Right. Hit the suit. In fact, Carl
6 Forlough (phonetic) used to come in for a suit every year
7 because he protected the sign.

8 THE COURT: I'll share this with everybody that I
9 was almost born in Evans Field. My mother was at the game the
10 night before. That obviously has nothing to do with this
11 case.

12 MS. CHANES: But it's funny.

13 THE WITNESS: From working with Mr. Stark, I -- to
14 make a long story short, I went into the floor waxing business
15 when I was 14 years old. By the time I was 18 years old, I
16 was the largest floor waxer in New York. Sold the business.
17 Went into real estate. Built two houses for people that lived
18 near me in Brownsville. Told them I'm in the real estate
19 business. Brought some property and built two houses for
20 them. And I made \$2,000 on each house, and I had to wax a lot
21 of floors for \$2,000. And then I started to buy land in the
22 Brownsville, Brooklyn area, and I started to build -- I
23 started with the two houses. Then I went four, and then six,
24 and then I just kept building houses in areas that I played
25 ball as a younger person. And I went into an area called

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1 Kinary, and then I went into Basin (phonetic). From there I
2 went to Staten Island. From Staten Island, I went into
3 High Pog (phonetic). I'm in Islip now and developing
4 properties, to make a long story short.

5 Q (BY MR. EBERT) How far did you get in school?

6 A High school, just about finished.

7 Q Did you not go to college?

8 A No, I couldn't afford to.

9 Q When did you first acquire the property that we're
10 talking about here?

11 A A little over 40 years ago. It's my first building, my
12 commercial building. I was building houses, and I decided to
13 see -- in the housing development, you build, and you sell and
14 you just keep doing that. And I thought maybe I can start
15 getting income, so I bought this building on Jackson Avenue.
16 It's my first building.

17 Q Did you acquire the whole block when you started?

18 A No, there were three pieces out, and I acquired them over
19 the last -- in fact, the last piece I bought was in -- about
20 five years ago.

21 Q Tell us what -- how is the property used currently?
22 What's on it? How is it used?

23 A Currently, the tenants are moving out. Probably by --
24 sometime by the end of this month, 90 percent will be empty.
25 There's probably about 80 percent now empty, and by the end of

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1 this month, it will be 90-plus percent, and by January 5th it
2 should be a hundred percent.

3 Q And what are the buildings used for?

4 A Commercial. Very few residential on Jackson Avenue, but
5 basically commercial.

6 Q Rental properties?

7 A All rental, yes.

8 Q Did you adopt any particular leasing strategy for this
9 property?

10 A Yes. When I saw Citicorp being built, I -- I'm just a
11 block from Citicorp, which is -- I said this is the time that
12 my property will get some value, and I'll eventually build
13 something there like a Citicorp. At first I was thinking of a
14 commercial building, and I started to sign all my leases with
15 90-day -- 60 and 90-day demolition clauses. So all my leases
16 that I sign had 60 and 90-day demolition clauses, and that was
17 for at least 15 years.

18 THE COURT: How's the Citicorp building doing these
19 days? I pass it all the time, and I'm just curious.

20 THE WITNESS: It's fine. Citicorp -- in fact, that
21 whole area is booming.

22 MR. EBERT: I'm sorry, your Honor.

23 THE COURT: It's all right.

24 Q (BY MR. EBERT) Why did you put in these 60, 90-day
25 clauses?

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1 A Because I knew eventually I'm going to be build a
2 building. At first I thought it was going to be an office
3 building.

4 BY THE COURT:

5 Q Let's get to why we're here. You obviously had some
6 relationship with Meres or Mr. Cohen.

7 A Jonathan Cohen, yes.

8 Q He talked about when he first met you and what your
9 understanding was. There was nothing in writing, but you had
10 some sort of understanding. Tell me all about that.

11 A I met Jonathan Cohen -- what happened years ago, I met
12 this Pat Dillilo (phonetic). He had come to me and -- he knew
13 me as Jerry. And he said to me, Jerry, what I would like to
14 do -- he was taking graffiti off walls in and around Queens,
15 and he said the artists -- I know some artists and they'd love
16 to put some work on it.

17 Q Who is this person again?

18 A Pat Dillilo. He was the originator -- they started what
19 was called the Phun Factory.

20 Q How long ago was that?

21 A Maybe 18, 19 years ago.

22 Q He came with the idea of decorating?

23 A Putting graffiti on the building. So I said fine. I
24 said let's see how it goes. Start with it. Go. And during
25 that time -- I can't tell you that, but maybe it was, like,

1 10, 11 years ago, Jonathan was one of the -- I believe one of
2 the artists, but he was with Pat Dillilo. And Pat always
3 knew, because at that time, eventually I'm going to take down
4 the building. And I had three criteria; no pornographic, no
5 political, and no religious.

6 Q But you were amenable to having the building decorated?

7 A Yeah, your Honor. I'd said let's start -- because at the
8 beginning, I had a problem with the neighbors in the
9 neighborhood, and they start seeing graffiti going up and I
10 would speak -- because I knew them. I was somewhat active in
11 the area. And I -- I said, watch, it will evolve itself. And
12 it's something that I can always change. We can always
13 whitewash the building or do something to it. And I liked
14 what was happening. To this day, I like what's happening;
15 there's no problem with it. But it's -- sometime I got to
16 take down the building.

17 So I had, at that time, some sort of a problem with
18 Pat Dillilo, and Jonathan was one of the people that were
19 there, had come over to me and said, Jerry, I'd like to do
20 what Pat is doing; in fact, I'll do a better job. And
21 Jonathan's a nice young man. I've seen him there, you know,
22 before. And I said, sure, Jonathan, I have no problem with
23 that. But, again, my criteria, and I'm going to be knocking
24 down the building.

25 Q You told him that?

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1 A Yes, absolutely. And he knew all along, and so he put up
2 these, Jonathan -- and he got these other graffiti artists to
3 do the building, and over the years --

4 Q It became a happening?

5 A Not only a happening. I thought it was terrific. I
6 thought what Jonathan and the artists did was wonderful, but
7 it was always -- if you would take five years ago or eight
8 years ago, what they did then is as nice as what they did
9 three months ago. They painted over their own work. It was
10 always temporary. Anything that was even from temporary to
11 permanent was maybe another three years, another four years.
12 It was never there to stay permanent forever. It was -- in
13 fact, when I had a problem, and I had manlifts there, what
14 they called cranes. I let them use it. Use it. Go at night.
15 Use it. They don't mind even doing this at night. And what
16 they did, as everybody said, I think is wonderful also.

17 Q Also it made your property attractive to the community, I
18 guess?

19 A No. To myself and maybe to the average laymen, yes. To
20 me, I liked it so I kept it. But if you're a businessman,
21 going in and wanting to come into my building, you got
22 concerns of that type of building, you know. To maybe
23 yourself, your Honor, or me, I liked it. Since it's my
24 building, you don't want to come in, don't come in.

25 Q I've heard some testimony it became something larger than

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1 you might have anticipated; there's a lot of people that
2 started to come and look at this, and it became -- I think
3 somebody said international recognition even. Do you remember
4 seeing people come in there all the time?

5 A Let me tell you, your Honor. This isn't knew. This is
6 back 15 years, 12 years ago they had come. If they didn't do
7 nice work, I would have stopped it.

8 Q Right. But I'm concerned with what type of recognition.

9 A Not recognition. The main thing that everybody's
10 speaking here, about recognition, it was always temporary,
11 always temporary, your Honor. Please, I must --

12 Q Relax. I understand.

13 A Okay.

14 Q We'll get into that. But I just want to know who was
15 coming there?

16 A People.

17 Q Thousands of people were coming?

18 A Not thousand, but you get people there. Collectively
19 they come because it's beautiful. It absolutely is beautiful.
20 I'm not going to sit here and tell you it's not beautiful. If
21 I didn't think it was beautiful, I wouldn't let them do it.

22 Q But people were coming?

23 A To this day they're coming. They came -- if you listen
24 to their expert testimony that they had or the testimony from
25 the expert, he comes every month to take pictures. He's not

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1 taking the same pictures every month. He sees new work.

2 Q It became a popular place, a designation and the public
3 was embracing it?

4 A Absolutely.

5 Q Tell me a little bit about the arraignments you made with
6 the city, I guess, or the Queens board. Just give me an idea
7 of when that started and what came out in the wash.

8 A We have to go through a process in order to get to what
9 they call the "your lad" (phonetic). So we have to go
10 through -- you do your environmental.

11 Q Planning board?

12 A Yes, but even before that, before you go to planning --
13 before you go to the planning board to get the permission, you
14 go through maybe a year of going up and back to your building;
15 they don't like your building, change the building; make this
16 building -- and the reason for that is -- two ways to do it.
17 I didn't have to go through any of that, as a right. I did
18 that to get more density on my property. When you get more
19 density on your property, naturally I can create more
20 apartments. Now, by creating more apartments, I can take the
21 same doorman that you have coming in, that you're paying X
22 amount, if 600 people are paying for him is one thing. If I
23 can get a thousand people paying for them, now I can make my
24 rents cheaper.

25 Q I understand you want to maximize the use of your

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1 property. But you got final commission. Where -- just tell
2 me where the permit process is.

3 A It's all finished. I've got -- not the permit. I got
4 the unanimous approval from City Planning, from the bureau
5 president's office. She does that, and -- which is one of the
6 things unheard of, city counsel recently gave me unanimous
7 approval.

8 Q Just tell me was there any discussion about the existing
9 5Pointz works of art on the building?

10 A Yes.

11 Q Tell me about that.

12 A On each one of these hearings, people from 5Pointz
13 come -- had came down to tell them why 5Pointz should stay,
14 and they gave their reasoning; they're passionate about it, so
15 they said they feel this is international. It should stay.
16 So they listened to them, and they gave me the approval, said
17 I -- they weighed it, and they felt what I'm going to be doing
18 was, in -- my thing, important. So they each weighed it.
19 They gave me the approval to go forward.

20 Q Did you have any discussion as to whether any place would
21 be made available for future aerosol art or what we're talking
22 about in this case?

23 A Yes. Absolutely.

24 Q Tell me about that.

25 A In the building that I'm going to build, we're putting up

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1 walls for the aerosol people to come back and put up again,
2 the aerosol.

3 Q They can replicate?

4 A They can make changes. Like maybe one will stay up there
5 five months.

6 Q Where are these walls? Is this the condition that the
7 authorities created, or is this something you did on your own
8 volition?

9 A It was -- the authorities -- but this was a combination.
10 I've always had intentions of bringing the graffiti people
11 back.

12 Q And was it necessary for you to do that, to get the
13 consents or the permissions that you receive from the
14 authorities?

15 A Yes.

16 Q Was this necessary, quid quo pro?

17 A It's documented that we're going to have graffiti artists
18 back.

19 Q The city authorities wanted this and you agreed?

20 A Yes. Absolutely.

21 Q Tell me about the space that you're going to have for the
22 so-called graffiti artists?

23 A Well, we have -- well, like the building I started, I sit
24 here now and we have particular walls to -- for the graffiti
25 artists to come back, which is 60-foot high. I'm not thinking

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1 of walls this high. We got 60-foot walls for them to come
2 back. But like when I first started, it evolves. We know
3 what we're going to be doing, and who knows from there what
4 happens? We -- if it goes, we just keep on seeing where it
5 goes. Even --

6 Q Let me interrupt. You're going to have Mr. Cohen still
7 be the so-called quasi-curator to decide what goes up on the
8 new wall, so to speak?

9 A I'm not so sure.

10 Q Maybe somebody else?

11 A Maybe somebody else.

12 Q It's not going to be me, though?

13 A Maybe.

14 Q This is a large space, and you're going to allow folks to
15 come back?

16 A Graffiti artists will be back, yes, if they choose to.

17 Q I understand you can't force them to do so.

18 A No.

19 Q Are you planning for this to be in writing?

20 A It's in writing now.

21 Q So is there a document that defines where the graffiti
22 artists will be able to do this work?

23 A Somewhat, yes.

24 Q We have something of that here? I'm just curious. I
25 mean, is it as large as the space that exists right now?

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1 A No.

2 Q Half the size?

3 A Less than half the size.

4 Q Less than half the size?

5 A Less than half the size. But as we sit here now, who
6 knows where else I'm putting it in my building.

7 Q You might decide --

8 A Sure. Even when I decided in the Phun Factory, we
9 walked.

10 Q As I understand, there's a part that you have to allow
11 graffiti artists; that was the deal you made?

12 A Yes.

13 Q And, then, you may voluntarily also allow them to come
14 back, as you've done in the past?

15 A Yes, I think what they -- for me, personally, I think
16 that the term that I use makes a "cool" building.

17 Q It's a cool building?

18 A A nice building.

19 Q And, also, it's economically advantageous, because it
20 might attract more tenants?

21 A The type of tenants. Not every tenant wants to come into
22 a building that has graffiti. I like what I'm doing, so you
23 move into my building, but it doesn't attract -- there is a
24 segment that just don't want to go there, would not go there.
25 I don't know, but --

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1 Q There's a segment that would really be attracted to it?

2 A Otherwise, I wouldn't be doing it.

3 Q So you made this assessment that it's your economic
4 interest, but you also have some sense --

5 A It was no economic interest to bring them here. At the
6 beginning, had no economic interest. It's my feeling that --
7 what I like. I can't draw anything, so when I see what these
8 people do, it's amazing to me.

9 Q So you're telling me that really on your own volition
10 you're very supportive of what this is about?

11 A Always, your Honor. If you don't mind me going back,
12 look, I own a place called Pilgrim State Hospital in
13 Long Island.

14 Q There are a lot of people there that can do graffiti
15 work, I suspect?

16 A Very well. I met with Jonathan and Marie at my office.
17 I had taken them around -- the property that I'm buying, that
18 I bought, that I'm going to be doing it, I'm creating what I
19 call like a SoHo district there. We will have the largest
20 outdoor sculptured work in the state of New York. So I sat
21 with Jonathan and Marie and asked them their opinion, and I
22 showed them, which is larger than I have now. I think it
23 would be a great idea to do what I've created there or they
24 created there, actually, with my permission to do something
25 there. They looked at it. They said fine and give me some

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1 suggestions. Marie said why don't we do this, because they
2 have that type of talent and Jonathan has that foresight to do
3 something like that. So they said let me think about it over
4 the winter. Mind you this is maybe May, June.

5 Prior to that, we went to City Planning, went to the
6 borough president's office. They came down to object to what
7 I'm doing. Still let them paint. I didn't stop them. Still
8 let them come, even though they objected. I didn't say stop
9 painting graffiti.

10 Q Who?

11 A Marie came down and some of the others that might be
12 sitting here had came down to object to me taking down --
13 taking down 5Pointz or my building on Jackson Avenue.

14 Q They were upset about that?

15 A They were upset about it. I understand their passion.
16 The passion that they have is nowhere near the passion that I
17 have to build this building, this I can tell you. This is my
18 first building. They could never buy it. Nobody could buy
19 this building from me. There's no amount of money that you
20 can buy this building for. It's not for sale.

21 Q How many tenants do you expect to have?

22 A At least a thousand apartments.

23 Q Big operation?

24 A Yes. It will create thousands of jobs.

25 Q Is there any way of incorporating the existing walls into

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1 the new --

2 A Impossible.

3 Q Engineering impossible?

4 A Engineering impossible. Impossible. Financially
5 impossible. Engineering. Just --

6 Q I guess you would if you could, but you can't?

7 A No, I'm going to say why. It's not that. They like to
8 be involving (sic) art. They've always done it. As I told
9 you before, they had come down to complain that they want to
10 keep this. I understood their passion. I sat with them
11 outside. Say hello to them, shook their hands, kept on going,
12 because I knew I would eventually get the city to agree with
13 it. Allowed them to paint. Met with them in June. Sat with
14 them. All of a sudden they come up with this painting, and
15 now they put in this law of VARA. "I got you, Jerry. I got
16 you." "What did I do to you? I let you keep painting. What
17 is that gotcha?"

18 Q VARA came into existence, if I recall, in 1990, but this
19 started before that.

20 A No, what I'm saying, your Honor, I let them paint
21 because it was temporary. So they come in. They showed
22 paintings here today -- if you look at the paintings that they
23 showed that was done, more than half was done in 2013, and
24 maybe ten of them were done in the last month and a half.
25 "Gotcha, Jerry. We're going to paint and gotcha." And to sit

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1 here and say they didn't know it was temporary, they come up
2 here and say, oh, I didn't know it was temporary. We showed
3 them; they say it's temporary.

4 And, another thing, you can see even the person that
5 did beautiful graffiti on his stuff, that came from Europe,
6 now is upstate painting somewhere, he said, on his own
7 painting it says "Save 5Pointz." Doesn't he know it's coming
8 down?

9 Q Anyway. Calm down.

10 A I'm calm. I'm sorry, your Honor. I'm passionate.

11 Q A lot of passion in this building.

12 A Well, because --

13 Q You don't have to go on. I got to sort of chime in a
14 little bit.

15 THE COURT: Do you want to ask any other questions,
16 Mr. Ebert? I mean, I think he's got it all out, unless
17 there's something else you want to bring out.

18 MR. EBERT: No, your Honor. I can submit these
19 exhibits. They're also exhibits to his affidavit that's been
20 submitted on the motion, the community board resolution.
21 That's in the affidavit.

22 THE COURT: So --

23 MS. CHANES: I'm sorry --

24 THE COURT: You want to inquire?

25 MS. CHANES: Could you just ask a question about the

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1 exhibit, your Honor? This community board resolution that is
2 a written agreement that Mr. Wolkoff was referring to
3 between -- as far as providing space for artists?

4 THE COURT: I have that.

5 MS. CHANES: I'm asking if that's it; that was his
6 testimony?

7 THE COURT: That's what I want to see.

8 MR. EBERT: Yes.

9 THE COURT: Which document is that, so I know what
10 I'm looking at.

11 MR. EBERT: I can hand it back up, but it's
12 Exhibit 7. Should I just hand them back up, your Honor.

13 THE COURT: Do I have all the exhibits? I guess I
14 do.

15 MR. EBERT: They were attached to his affidavit.

16 THE COURT: All right. So make sure we have them.
17 Mike, do you have all these?

18 THE CLERK: Yes.

19 THE COURT: Go ahead. You want to question
20 Mr. Wolkoff?

21 MS. CHANES: So that was exhibit what?

22 MR. EBERT: I'll give you a copy.

23 MS. CHANES: Already. Thank you.

24 THE COURT: You haven't lost your Brooklyn accent,
25 by the way.

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1 THE WITNESS: Thank you. I thought I'd been in
2 Long Island too long.

3 CROSS-EXAMINATION

4 BY MS. CHANES:

5 Q Good afternoon, Mr. Wolkoff. You mentioned just now that
6 when the graffiti was initially being put on your building
7 certain people had concerns about going into a building with
8 graffiti art, is that correct, when you first started?

9 A Well, when I first started, the graffiti -- when the
10 graffiti -- my perception is from the outside and speaking to
11 somebody, that they were concerned about that type of building
12 with the graffiti, yes.

13 Q That certain people might not want to go inside?

14 A Yes.

15 Q At the time was the 5Pointz building mostly artists'
16 studios?

17 A No.

18 Q Did they gradually convert to artists' studios over the
19 years?

20 A Much later on, yes.

21 Q And going back to the testimony you just finished, you
22 said that 80 percent of the buildings are empty now, the
23 buildings that comprise that block; is that correct?

24 A No, I said by the end of this month 80 percent to
25 90 percent will be vacant.

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1 Q But the -- I'm sorry. I can't -- how many tenants are
2 there?

3 A Twenty some odd.

4 Q Okay. Mr. Wolkoff, you were aware that Mr. Cohen and
5 other artists are painting at 5Pointz; correct? You were
6 aware that Mr. Cohen --

7 A Oh, yes. Yes, yes, yes.

8 Q And you gave him permission to paint the outside of the
9 building; correct?

10 A I gave Jonathan Cohen control of who he brings in. I
11 don't know any of the artists. I may have seen them, but I've
12 never said to an artist, "Paint."

13 THE COURT: You gave them the green light?

14 THE WITNESS: Yes. Absolutely.

15 THE COURT: We've heard all that.

16 THE WITNESS: Yeah, sure.

17 Q (BY MS. CHANES) And that permission spanned a number of
18 years; correct?

19 A Yes.

20 Q Did you also give the artist permission to paint inside
21 the building?

22 A No.

23 Q Did you see during your visit to the building that the
24 building was being painted on inside?

25 A Yes.

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1 Q Did you tell the artists to stop doing that?

2 A No.

3 Q And the artists have been painting on the inside of the
4 building for years too; correct?

5 A No, the staircase is. But now, recently, they went into
6 the floors itself, which I've never given permission. I don't
7 know how they got in there, but there is art inside because
8 it's been empty, your Honor.

9 Q So your testimony is that you gave -- that you knew?

10 A Permission for the outside not the inside, yes.

11 Q And you gave Mr. Cohen an office at 5Pointz?

12 A Not an office, no.

13 Q That little room on the loading dock?

14 A It's not an office. I wouldn't consider that an office.
15 I would consider that a little space.

16 Q I think it helps the court reporter if only one of us
17 speaks at once.

18 THE COURT: We're doing fine. We're doing fine.

19 Q (BY MS. CHANES) All right. So you gave Mr. Office --
20 you gave Mr. Cohen a small space in the loading dock that he
21 uses as an office; correct?

22 A Yes, free of charge.

23 Q And you also gave Mr. Cohen space to store ladders at
24 5Pointz; correct?

25 A No, I did not.

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1 Q Were you aware that he was using another space at 5Pointz
2 to store ladders?

3 A No, I did not.

4 Q Were you aware that the artists used ladders to paint at
5 5Pointz?

6 A Yes.

7 Q Did you have any understanding of where those ladders
8 were stored?

9 A No.

10 Q Did you give Mr. Cohen space to store painting supplies
11 and equipment?

12 A I don't understand. Did I give him the equipment?

13 Q No, did you give him space to store painting supplies and
14 equipment?

15 A No, in that little room? These are -- as far as I'm
16 concerned, these were aerosol cans. It didn't take much space
17 for them to put an aerosol can. And the artists, I thought,
18 bring their own. So I didn't give him any space to bring
19 aerosol cans anywhere. If he wants to put it in that storage
20 space, that's fine.

21 THE COURT: Ms. Chanes, the space is not going to
22 depend on this, really, so let's move on to something that's
23 more relevant.

24 Q (BY MS. CHANES) Mr. Wolkoff, you claim that you had an
25 understanding with the artists, that permission that you were

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1 giving them to paint at 5Pointz was temporary; correct?

2 MR. EBERT: Objection. He only had an agreement
3 with Mr. Cohen. He never said anything about the artists.

4 THE COURT: You can answer.

5 I think he's already answered.

6 THE WITNESS: I said I don't know any artists.

7 THE COURT: He said his relationship was with
8 Mr. Cohen.

9 Q (BY MS. CHANES) So you gave permission to Mr. Cohen to
10 have -- Mr. Cohen and other artists to paint at 5Pointz?

11 A It's up to him, yes, to bring in the artists, yes.

12 Q And that so-called understanding was not in writing;
13 correct?

14 A Correct.

15 Q In fact, do you have any written releases from any of the
16 plaintiffs' artists in this case?

17 A I don't know any of the artists.

18 Q Do you have any written releases from --

19 THE COURT: The answer is no.

20 Q (BY MS. CHANES) Okay. Are you aware sitting here today
21 that VARA requires written release?

22 THE COURT: It's not what he knows about VARA. He
23 doesn't have anything in writing. We understand that.

24 Q (BY MS. CHANES) Okay. Mr. Wolkoff, you testified before
25 that 5Pointz is a popular tourist attraction; correct?

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1 A Yes.

2 Q And you said people come from all over to see the
3 building and artwork; correct?

4 A I believe so, yes.

5 Q Are you aware that 5Pointz is listed on numerous
6 New York City tour guides?

7 A Could be.

8 THE COURT: But from your own knowledge, from what
9 you notice?

10 THE WITNESS: They come. Sure.

11 THE COURT: It's a tourist attraction.

12 THE WITNESS: I think it's going to be again a
13 tourist attraction. Understand this, it's not stopping. For
14 some reason or other they think it's stopping.

15 THE COURT: I understand. What they're saying is
16 that --

17 THE WITNESS: Yes, people come there, absolutely.

18 MS. CHANES: And the reason people come to
19 5Pointz --

20 THE COURT: He doesn't know the reason people come.
21 It's a tourist attraction. They come because of what's on the
22 walls.

23 MS. CHANES: Okay.

24 THE COURT: What else do you have?

25 Q (BY MS. CHANES) Mr. Wolkoff, you have earned a

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1 significant amount of money over the years as a result of the
2 artwork on the 5Pointz; correct?

3 A Wait. Hold on.

4 THE COURT: Objection sustained.

5 MR. EBERT: Objection.

6 Q (BY MS. CHANES) Mr. Wolkoff, how much money -- was there
7 a movie called --

8 MR. EBERT: Objection, your Honor.

9 THE COURT: I haven't heard the question yet.

10 Q (BY MS. CHANES) Mr. Wolkoff, was there a movie called
11 "Now You See Me" filmed at 5Pointz last year?

12 A Yes.

13 Q And that movie was filmed over a period of approximately
14 three months; is that correct?

15 A I wouldn't know how long it took.

16 Q Have you seen the movie?

17 A No.

18 Q Were you paid for the use of the movie -- by the movie
19 crew to use 5Pointz?

20 A I believe so, and I believe -- I had very little to do
21 with it, your Honor. My son handled that, so I couldn't tell
22 you the amount.

23 THE COURT: They made a movie.

24 THE WITNESS: They made a movie. I don't have no
25 problem, but I didn't see it.

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1 Q (BY MS. CHANES) And the reason they made the movie was
2 because of the artwork; correct?

3 MR. EBERT: Objection, your Honor.

4 THE WITNESS: I can't tell you why they made the
5 movie. I have no idea.

6 THE COURT: Next question.

7 You had no personal contact?

8 THE WITNESS: I had no personal contact.

9 THE COURT: He knows there was a movie. He knows
10 nothing about it. Go ahead.

11 Q (BY MS. CHANES) Mr. Wolkoff, there was a movie called
12 "Trasers" that was also filmed at 5Pointz; are you aware of
13 that?

14 A No, but it could be. I don't know.

15 Q Are you aware of the fact that 5Pointz is used at -- in
16 various video shoots?

17 A Yes.

18 Q Such as video shoots for the musician Joss Stone?

19 A I don't know what you're talking about, Joss Stone, but
20 could be. I don't know.

21 Q Are you paid for the use of 5Pointz for those video
22 shoots?

23 A I don't know. Could be. My son handles that, I don't.

24 Q So your son -- wouldn't your son tell you?

25 MR. EBERT: Objection, your Honor.

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1 MS. CHANES: I'm interested, your Honor --

2 THE COURT: He said he doesn't know. He said his
3 son handles it.

4 MS. CHANES: All right. It goes to stature,
5 your Honor.

6 THE COURT: But the question is totally improper of
7 this witness.

8 MS. CHANES: All right. Then I'll call David.

9 Q (BY MS. CHANES) Mr. Wolkoff, how tall is 5Pointz?

10 A It starts from a single story, about 14 feet. Then it
11 goes -- then you got some at three stories, some at two
12 stories, and the largest is -- 12,000 square foot is the five
13 story.

14 Q All right.

15 A That's 12,000 in square foot inside the building.

16 Q And 5Pointz is painted pretty much top to bottom with
17 artwork; is that correct?

18 A Yes.

19 Q Some of the works on the upper stories of 5Pointz have
20 been there for years; correct?

21 A Somewhat, yes.

22 Q And some of them have been there, in fact, before --
23 strike that. Did you ever repaint 5Pointz after the graffiti
24 started to be painted on the building?

25 A Yes.

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1 Q And when was that?

2 A 2009.

3 Q Was that because the fire escapes collapsed?

4 A Somewhat, yes.

5 Q And then the city ordered you to do certain work on the
6 property; correct?

7 A No, I had to straighten out for -- excuse me. Where the
8 staircases came down. A portion of a staircase came down,
9 took all of that. I was so concerned about the other one
10 coming down, I voluntarily took it down myself not because of
11 the city.

12 Q And after that, did you encourage the artists to paint at
13 5Pointz and cover the newly blank walls?

14 A No, the word "encourage" is not -- I liked what they did.
15 Jonathan came to me and he wanted to paint. They're painting
16 up until the judge stopped us from painting.

17 Q So other than -- strike that. Since the repainting of
18 the building at 5Pointz in 2009, a number of the works at that
19 property have been there for years; correct?

20 A Very few.

21 Q Very few?

22 A Yes.

23 Q Do the artworks on the upper stories change frequently?

24 A That's few out of the thousands that were painted on,
25 yeah.

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1 Q Of the art works that are currently at 5Pointz, are --
2 the above-ground works, they've been in place, essentially,
3 since 2009?

4 A Some of them, yes.

5 Q Have most of them?

6 A No. Most of them throughout?

7 Q Not most of them throughout, most of -- the upper story
8 works?

9 A I couldn't say that. I wouldn't -- I'm not sure. I
10 don't think most of them are up there.

11 Q Would it refresh your recollection if we showed you
12 pictures from just after the fire escapes failed to current
13 pictures?

14 THE COURT: I don't think we need that.

15 Q (BY MS. CHANES) Mr. Wolkoff, you have pictures of the
16 works of art of 5Pointz hanging in your office; right?

17 A I have -- hanging in my office I have articles from
18 5Pointz; one from the New York Times and one from the Real
19 Deal, of my son and I taking a picture by 5Pointz, and them
20 making a statement of what we're going to be doing with the
21 building in the future and the type of art. And since you
22 mentioned it, probably 95 percent, since those pictures were
23 taken, are not there anymore. There's new art.

24 Q But those pictures were taken when you were walking on
25 the ground, correct, with street-level artwork behind you?

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1 A Some of them, it could be, yes. And then -- and it's
2 not -- some of them are not even there anymore. In fact, most
3 of them are not there anymore.

4 MR. CHANES: Move to strike the additional
5 testimony, your Honor.

6 THE COURT: Where are we going with this? Let's
7 wrap it up. Come on.

8 MS. CHANES: I'm wrapping up.

9 Q (BY MS. CHANES) Mr. Wolkoff, you testified earlier about
10 planning hearings that you attended?

11 A City Planning hearings, yes. I attended City Planning
12 hearings, yes.

13 Q And you said that you had received unanimous approval for
14 your planned development from City Planning. And what were
15 the other two agencies?

16 A City Planning. Well, Borough Hall and the city counsel
17 unanimous.

18 Q But isn't it true that the local community board voted
19 unanimously against your development?

20 A Yes, but there's a proviso. They sent me a letter.

21 MS. CHANES: Move to strike.

22 THE WITNESS: Judge, you want to hear the reason if
23 it's important?

24 THE COURT: Go ahead. You let me know. Go ahead.

25 THE WITNESS: The community board voted against my

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1 development. I called up the head of the community board and
2 I said why would you vote against us? He said because we got
3 lack of communications. I didn't attend any of that. I had
4 representatives attend. So when I spoke to them, I said why
5 would you do this? You don't know me. He said nobody would
6 answer our questions. I sat down with them. They asked me
7 the questions. One of them was art and things like that, and
8 I said absolutely. They said it was a lack of communications,
9 Jerry. So I said --

10 THE COURT: I don't know --

11 THE WITNESS: Excuse me. But the bottom line is
12 they gave me a letter of support after that meeting. They
13 gave me a letter of support, so I just wanted --

14 THE COURT: I understand. You went through the nuts
15 and bolts of the interaction.

16 THE WITNESS: They came back.

17 THE COURT: Go ahead.

18 MS. CHANES: One additional question, your Honor.

19 Q (BY MS. CHANES) Mr. Wolkoff, I believe you testified
20 that you were in discussions with various artists as part of
21 the requirements for this permitting process about what you
22 would be doing with the space; is that correct?

23 A No, you are incorrect. I didn't speak to any artists. I
24 spoke to Jonathan. I never met with my other artists.

25 Q Did you meet with Jonathan in connection with your City

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1 Planning application?

2 A My City Planning application, no. I met with Jonathan in
3 between -- in fact, one of the things, when I worked with
4 Jonathan, I said, "Listen, I own this building. Why don't you
5 do some of the walls," which his bulbs are on now. When I
6 walked with Jonathan, I said, "Jonathan, look." I said, "I
7 own the building. Do it."

8 THE COURT: One last question. I have a few
9 questions. Then we're going to wrap it up.

10 Q (BY MS. CHANES) Okay. What I'm trying to get at is do
11 you have any agreement in place now with any of the plaintiffs
12 in this action, Jonathan or any of the other artists?

13 A No, I do not have an agreement.

14 THE COURT: There's no agreement that you have?

15 THE WITNESS: No.

16 Q (BY MS. CHANES) Regarding the new space, and how it will
17 be used and how it will be allocated?

18 A The only agreement that I have is with the city of
19 New York that I'm obligated to do this.

20 BY THE COURT:

21 Q So this is the quid quo pro; for you to get permission to
22 do the thousand units, you have agreed to make the space
23 available?

24 A Yes.

25 Q Would you have done that on your own initiative?

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1 A Not so sure. Probably.

2 Q And you have other space that you could have used, if you
3 wish to do so, to allow these folks to also continue their
4 passion on other parts of your building? You said you would
5 be willing to do that?

6 A As we see what happens.

7 Q Right.

8 A And as we go. No different than before. We just -- I'm
9 sorry. Things just happen.

10 Q I understand that, but I just want to get a sense as to
11 whether you would be amenable to letting them use other space?

12 A Yes, if it's proper and right, absolutely.

13 Q What other space? Is there any particular space in mind?

14 A Your Honor, I have walls, you know, in between.

15 Q Lots of walls?

16 A I'm sorry. Understand this, I like what these people do.
17 If I didn't, I would have stopped it 20 years or so.

18 Q You could have done that.

19 A I liked it. I liked it even when they came to city
20 counsel to stop. They kept doing it. I didn't say stop.
21 They can't say I told them to stop.

22 Q I guess what I'm trying to get a sense of is what if the
23 city counsel didn't make this a condition for all of the
24 permissions you received from the city authorities, I guess,
25 would you still have allowed these folks to use this property

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1 in any event?

2 A Your Honor, I brought him down -- I brought him down --

3 Q Just answer my question.

4 A I brought him down -- so you can understand where I'm

5 coming from, I had taken him to Long Island, my property

6 there, prior to all of this.

7 Q You have a history of allowing him to do this?

8 A So why would I not do this after? I like what they do.

9 Q But the city wanted to make sure it would happen, I
10 guess; right?

11 A Because when they went down to make their complaints,
12 politically the city said, okay; Jerry, would you do this? I
13 said absolutely. It was never let me think about it, even.
14 Absolutely.

15 THE COURT: Okay. We understand.

16 MS. CHANES: I got to move to strike that.

17 THE COURT: Well, I've heard it anyway. Go ahead.
18 Is there anything else?

19 MS. CHANES: Actually, yes, two questions.

20 Q (BY MS. CHANES) One is with the new development, as
21 you're describing it, approximately how many square feet of
22 wall space would be available -- are you proposing to make
23 available for graffiti artists?

24 A I don't know the exact square footage, your Honor.

25 THE COURT: You mentioned it was about one-half of

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1 what you have now.

2 THE WITNESS: Less than one-half.

3 THE COURT: One quarter?

4 THE WITNESS: Yes, something like that. I don't
5 know the square footage. But it would be something that's
6 significant where they can do their work.

7 Q (BY MS. CHANES) But did you take -- when you planned
8 that, did you take into account that the fact aerosol fumes
9 are toxic? Artists have to wear respirators, and it wouldn't
10 be safe for --

11 THE COURT: I don't know why you're having this
12 discussion.

13 THE WITNESS: Your Honor, listen to me.

14 THE COURT: I think we've heard enough. You can
15 step down. Thanks a lot, Mr. Wolkoff.

16 THE WITNESS: Your Honor, I appreciate it. I just
17 want to say one thing, tomorrow's my 77th birthday. I don't
18 want to disrespect. Is it okay if I don't show up tomorrow?
19 I just don't want to show any disrespect.

20 THE COURT: How will you be celebrating your
21 birthday?

22 THE WITNESS: Going to Long Island, back to work and
23 catch up on all the work I did, that I enjoy most of all. I'm
24 sorry to say but that's what I'm going to be doing.

25 THE COURT: May be like Grandma Moses, you'll pick

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1 up a paint brush when you're 88 years old and start painting.

2 THE WITNESS: No, I can't paint.

3 THE COURT: You may step down.

4 So I think we've heard everybody today. Except we
5 have one more person. We're going to hear the other expert
6 tomorrow.

7 MS. CHANES: Your Honor, I have a request. We
8 understood that Mr. Wolkoff Sr. was -- knew about the movies
9 and films that were filmed at 5Pointz, and they're relevant
10 because they go to the stature of the artwork.

11 THE COURT: All right. You have these -- you have
12 these films that were done there. All right. You can tell me
13 all about them. You can, you know, make a record about all
14 the films that were done.

15 MR. EBERT: We'll stipulate.

16 THE COURT: The expert tomorrow can testify about
17 that; right?

18 MS. CHANES: I don't think he knows about the films.

19 THE COURT: What do you want me to do? You want to
20 offer something in evidence to show me that it's recognized by
21 a wide segment of the population? I'm not precluding you from
22 doing that.

23 MS. CHANES: You know what, I can do that. That
24 would be easiest and conserve the Court's time. I'll draft
25 something and submit it.

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1 THE COURT: Your expert's going to be coming
2 tomorrow?

3 MS. CHANES: Yes, your Honor. And I believe you
4 said you wanted him at 11:00?

5 THE COURT: I like to do it at 10:00, because I have
6 to catch a plane in the afternoon.

7 What else do we have tomorrow?

8 THE CLERK: We have two conferences on at 2:30.

9 THE COURT: We're going to have to read just those.
10 I'll talk to you about that. They'll have to come earlier
11 because I have to get a plane. I'm sorry I didn't tell you
12 that.

13 MR. EBERT: I don't know what the expert's going to
14 testify about, but we may be willing to stipulate. From what
15 his bio says, is that he's big in Hip Hop and this is a big
16 thing in Hip Hop.

17 THE COURT: I want to hear from the expert.
18 Do you have an expert ready to go?

19 MS. CHANES: Yes, your Honor.

20 THE COURT: You've heard what Ms. Thompson said.
21 She may have a different view --

22 MS. CHANES: He.

23 THE COURT: He may have a different view of what
24 constitutes recognized stature; that's what I'm interested in.
25 So just -- you know, I have a feeling that I may not hear the

1 same testimony I heard from Ms. Thompson, such as the nature
2 of our business. I'm anxious to hear all about that.
3 Ms. Thompson has taken the view of the statute that -- sort of
4 a strict instructionist (sic) view, if you might use that
5 phrase, I guess, that it's a high bar type of gatekeeping. I
6 don't know how tall the gate is, how short the gate is; that's
7 what we want to find out.

8 MS. CHANES: Okay.

9 THE COURT: You have the *Carter* case. You have all
10 this precedence. We all know about it. And I can decide
11 whether or not the gate is open or closed. And in any event,
12 I'm not going to prevent him, in all probability, from not
13 going forward with the building. I'm not going to play any
14 games with you. But, you know, if they need the gatekeeping
15 and the statute, there may be compensatory aspects to this
16 thing. I don't know.

17 I told you before I would like to encourage aerial
18 artists, and I like to encourage people like Mr. Wolkoff to
19 allow this form of expression, to dot the landscape of urban
20 environments of New York City and elsewhere. I would like to
21 see if the law can accommodate all of that. Maybe you have
22 constructive thoughts on how the law can do that. If I follow
23 your road map, I'm going to kill the aerosol industry here,
24 and I don't think you want to do that. You're representing
25 these people.

1 MS. CHANES: I actually disagree that finding for
2 plaintiffs would kill the aerosol art industry. I think it
3 would do what VARA is supposed to do, which is to get people
4 to sign VARA waivers.

5 THE COURT: But to get every one of a thousand
6 artists to sign a VARA waiver is an impractical burden.

7 MS. CHANES: But there aren't a thousand legal
8 artworks that fall under VARA. Remember VARA carves out
9 exceptions for works for hire, for advertising, for promotion.
10 VARA -- the VARA coverage for the building exception --

11 THE COURT: Wouldn't it be nice if people like
12 Mr. Wolkoff didn't have to worry about getting all these VARA
13 waivers signed, and that the artists would feel that they are
14 being encouraged by the people like Mr. Wolkoff to come and do
15 their work and their passion on the buildings without having
16 to go through the technical niceties of VARA waivers. Don't
17 you think there's a better thing to accomplish?

18 MS. CHANES: Actually, I don't. I think that you
19 and I make our living on the technical niceties, so we want to
20 preserve those at all costs. In addition to that, and levity
21 aside, you know, Mr. Wolkoff, who is a sophisticated
22 businessman, who has beves of lawyers at his disposal, you
23 know, if he put those provisions in his leases, he could have
24 just as easily drafted a VARA waiver that would take -- and
25 I'm sure, you know, if he had it, he could have gotten

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1 plaintiffs to sign it, but he didn't.

2 Q Well, if you have this VARA waiver, you present it to
3 Mr. Cohen, what would have happened?

4 MS. CHANES: I don't know. I wasn't there.

5 THE COURT: Would he have signed it?

6 MS. CHANES: I don't know.

7 THE COURT: The VARA waiver says I can take the
8 building down and I require you to take all of your artwork
9 off any time I want; right?

10 MS. CHANES: I believe so.

11 THE COURT: And I just don't know. You tell me
12 whether your clients would be amenable to that.

13 MS. CHANES: Well, the statutory damages under VARA
14 are statutory damages that are meant to be punitive; they're
15 not a license to take down the artwork.

16 THE COURT: Whatever. But, you know, let's see what
17 the expert says tomorrow, and we'll sort it all out one way or
18 the other. 10:00 o'clock. If you can please have Mr. Simmons
19 here, I would appreciate it.

20 MS. CHANES: If I can have a copy of the CV for
21 Ms. Thompson.

22 THE COURT: You can take care of that exchange of
23 information, and we'll see you tomorrow at 10:00.

24 (Proceedings adjourned.)

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I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter?

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8

/s/ Nicole Canales

November 9, 2013

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Nicole Canales

Date

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